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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1041

[Docket No. CFPB-2019-0006]

RIN 3170-AA80

Payday, Vehicle Title, and Certain High-Cost Installment Loans

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is proposing to rescind certain provisions of the regulation promulgated by the Bureau in November 2017 governing Payday, Vehicle Title, and Certain High-Cost Installment Loans (2017 Final Rule or Rule). The provisions of the Rule which the Bureau proposes to rescind (1) provide that it is an unfair and abusive practice for a lender to make a covered short-term or longer-term balloon-payment loan, including payday and vehicle title loans, without reasonably determining that consumers have the ability to repay those loans according to their terms; (2) prescribe mandatory underwriting requirements for making the ability-to-repay determination; (3) exempt certain loans from the mandatory underwriting requirements; and (4) establish related definitions, reporting, and recordkeeping requirements. This proposal is related to another proposal, published separately in today's *Federal Register*, seeking comment on whether the Bureau should delay the August 19, 2019 compliance date for these portions of the 2017 Final Rule.

DATES: Comments must be received on or before **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].**

ADDRESSES: You may submit comments, identified by Docket No. CFPB-2019-0006 or

RIN 3170-AA80, by any of the following methods:

- *Electronic*: *https://www.regulations.gov*. Follow the instructions for submitting comments.
- *Email*: *2019-NPRM-PaydayReconsideration@cfpb.gov*. Include Docket No. CFPB-2019-0006 or RIN 3170-AA80 in the subject line of the message.
- *Mail/Hand Delivery/Courier*: Comment Intake, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552.

Instructions: The Bureau encourages the early submission of comments. All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *https://www.regulations.gov*. In addition, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning 202-435-7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers, Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Eliott C. Ponte, Attorney-Advisor; Amy Durant, Lawrence Lee, or Adam Mayle, Counsels; or Kristine M. Andreassen, Senior Counsel, Office of Regulations, at 202-435-7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Summary of the Proposed Rule

On October 5, 2017, the Bureau issued the 2017 Final Rule establishing consumer protection regulations for payday loans, vehicle title loans, and certain high-cost installment loans, relying on authorities under Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act or the Act).[1] The Rule was published in the *Federal Register* on November 17, 2017.[2] It became effective on January 16, 2018, although most provisions (12 CFR 1041.2 through 1041.10, 1041.12, and 1041.13) have a compliance date of August 19, 2019.[3] On January 16, 2018, the Bureau issued a statement announcing its intention to engage in rulemaking to reconsider the 2017 Final Rule.[4] A legal challenge to the Rule was filed on April 9, 2018, and is pending in the United States District Court for the Western District of Texas.[5] On October 26, 2018, the Bureau issued a subsequent statement announcing it

[1] Public Law 111-203, 124 Stat. 1376 (2010).

[2] 82 FR 54472 (Nov. 17, 2017). The Bureau released its proposal regarding payday, vehicle title, and certain high-cost installment for public comment on June 2, 2016 (2016 Proposal). 81 FR 47864 (July 22, 2016).

The Bureau received well over one million comments on the 2016 Proposal. As the Bureau noted in the 2017 Final Rule, these comments included a large number of positive accounts of how people successfully used such loans to address shortfalls or cope with emergencies and concerns about the possibility of access to payday loans being removed. 82 FR 54472, 54559. There were, however, a significant though smaller number of comments discussing negative experiences from individual consumers or persons concerned about the impact payday loans have had on consumers whom they knew. *Id.* at 54559-60.

[3] *Id.* at 54814.

[4] *See* Bureau of Consumer Fin. Prot., *Statement on Payday Rule* (Jan. 16, 2018), https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/.

[5] *Cmty. Fin. Serv. Ass'n of Am. v. Consumer Fin. Prot. Bureau*, No. 1:18-cv-295 (W.D. Tex.). On November 6, 2018, the court issued an order staying the August 19, 2019 compliance date of the Rule pending further order of the court. *See id.*, ECF No. 53. The litigation is currently stayed. *See id.*, ECF No. 29.

expected to issue notices of proposed rulemaking (NPRMs) to reconsider certain provisions of the 2017 Final Rule and to address the Rule's compliance date.[6] This is one of those proposals; the other is published separately in today's *Federal Register*.

The 2017 Final Rule addressed two discrete topics. First, the Rule contained a set of provisions with respect to the underwriting of covered short-term and longer-term balloon-payment loans, including payday and vehicle title loans, and related recordkeeping and reporting requirements.[7] These provisions are referred to herein as the "Mandatory Underwriting Provisions" of the 2017 Final Rule. Second, the Rule contained a set of provisions, applicable to the same set of loans and also to certain high-cost installment loans,[8] establishing certain requirements and limitations with respect to attempts to withdraw payments on the loans from consumers' checking or other accounts.[9] These provisions are referred to herein as the "Payment Provisions" of the 2017 Final Rule.

The Bureau is proposing in this NPRM to rescind the Mandatory Underwriting Provisions of the 2017 Final Rule. Specifically, the Bureau is proposing to rescind (1) the "identification" provision which states that it is an unfair and abusive practice for a lender to make covered short-term loans or covered longer-term balloon-payment loans without reasonably determining that consumers will have the ability to repay the loans according to their

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

[7] 12 CFR 1041.4 through 1041.6, 1041.10, 1041.11, and portions of 1041.12.

[8] The 2017 Final Rule refers to all three of these categories of loans together as covered loans. 12 CFR 1041.3(b).

[9] 12 CFR 1041.7 through 1041.9, and portions of 1041.12.

terms;[10] (2) the "prevention" provision which establishes specific underwriting requirements for these loans to prevent the unfair and abusive practice;[11] (3) the "conditional exemption" provision for certain covered short-term loans;[12] (4) the "furnishing" provisions which require lenders making covered short-term or longer-term balloon-payment loans to furnish certain information regarding such loans to registered information systems (RISes) and create a process for registering such information systems;[13] and (5) those portions of the recordkeeping provisions related to the mandatory underwriting requirements.[14] The Bureau also is proposing to rescind the Official Interpretations relating to these provisions.

As explained below, the Bureau now initially determines that the evidence underlying the identification of the unfair and abusive practice in the Mandatory Underwriting Provisions of the 2017 Final Rule is not sufficiently robust and reliable to support that determination, in light of the impact those provisions will have on the market for covered short-term and longer-term balloon-payment loans, and the ability of consumers to obtain such loans, among other things. The Bureau is not aware of any additional evidence that would provide the support needed for the key findings that are essential to such a determination and does not believe it is cost-effective for itself and for lenders and borrowers to conduct the necessary research to try to develop those key findings. The Bureau is therefore proposing to rescind those identifications. The Bureau is also now initially determining that its approach for unfairness and abusiveness was problematic

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[10] 12 CFR 1041.4.

[11] 12 CFR 1041.5.

[12] 12 CFR 1041.6.

[13] 12 CFR 1041.10 and 1041.11.

[14] 12 CFR 1041.12(b)(1) through (3).

and is proposing a different approach to determining whether consumers can reasonably avoid the substantial injury that the Rule determined is caused or likely to be caused by the failure to underwrite these loans,[15] whether such injury is outweighed by countervailing benefits to consumers and to competition,[16] and whether the failure to underwrite takes unreasonable advantage of particular consumer vulnerabilities.[17] Based on its reconsideration of these issues, the Bureau is proposing to rescind the Mandatory Underwriting Provisions in their entirety.

The Bureau is not proposing to reconsider the Payment Provisions of the 2017 Final Rule, and the Payment Provisions are outside the scope of this NPRM. However, the Bureau has received a rulemaking petition to exempt debit card payments from the Rule's Payment Provisions. The Bureau has also received informal requests related to various aspects of the Payment Provisions or the Rule as a whole, including requests to exempt certain types of lenders or loan products from the Rule's coverage and to delay the compliance date for the Payment Provisions. The Bureau intends to examine these issues and if the Bureau determines that further action is warranted, the Bureau will commence a separate rulemaking initiative (such as by issuing a request for information (RFI) or an advance notice of proposed rulemaking). In addition, the Bureau intends to use its existing market monitoring authority to gather data on whether the requirement in the 2017 Final Rule that lenders provide consumers with "unusual withdrawal" notices before the lenders make certain withdrawal attempts are made affects the number of unsuccessful withdrawals made from consumers' accounts.[18]

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[15] *See* 12 U.S.C. 5531(c)(1)(A).

[16] *See* 12 U.S.C. 5531(c)(1)(B).

[17] *See* 12 U.S.C. 5531(d)(2)(A).

[18] 12 CFR 1041.9(b)(1)(ii).

II. Background

The **Supplementary Information** accompanying the 2017 Final Rule contains background on the payday and vehicle title markets[19] and on the consumers who use these products.[20] The **Supplementary Information** also contains findings of the impacts that the Mandatory Underwriting Provisions of the 2017 Final Rule would have on consumers and covered persons.[21] The Bureau does not here repeat all of that information and those findings. Rather, this section summarizes the information and findings from the 2017 Final Rule that the Bureau views as most relevant to the Bureau's decision to propose rescinding the Mandatory Underwriting Provisions.

A. The Market for Short-Term and Balloon-Payment Loans

As the Bureau observed in the 2017 Final Rule, consumers living paycheck to paycheck and with little to no savings often use credit as a means of coping with financial shortfalls.[22] These shortfalls may be due to mismatched timing between income and expenses, income volatility, unexpected expenses or income shocks, or expenses that simply exceed income.[23] According to a recent survey conducted by the Board of Governors of the Federal Reserve System (Board), over one-quarter of adults are either just getting by or finding it difficult to get by; a similar percentage skipped necessary medical care in 2017 due to being unable to afford the

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[19] *See* 82 FR 54472, 54474-96.

[20] *Id.* at 54555-60.

[21] *Id.* at 54814-46.

[22] *Id*. at 54474.

[23] *Id.*, *citing, generally,* Rob Levy & Joshua Sledge, *A Complex Portrait: An Examination of Small-Dollar Credit Consumers* (Ctr. for Fin. Serv. Innovation, 2012), https://www.fdic.gov/news/conferences/consumersymposium/2012/A%20Complex%20Portrait.pdf.

cost. In addition, 40 percent of adults reported they would either be unable to cover an emergency expense costing $400 or would have to sell something or borrow money to cover it.[24] Whatever the cause of these financial shortfalls, consumers in these situations sometimes seek what may broadly be termed a "liquidity loan."

The Mandatory Underwriting Provisions of the 2017 Final Rule focused specifically on short-term loans and a smaller market segment of longer-term balloon-payment loans. As the Bureau noted, the largest categories of short-term loans are "payday loans," which are generally short-term loans required to be repaid in a lump-sum single payment on receipt of the borrower's next income payment, and short-term vehicle title loans, which are also almost always due in a lump-sum single payment, typically within 30 days after the loan is made.[25]

1. Payday Loans

Seventeen States and the District of Columbia prohibit payday lending or impose interest rate caps that payday lenders find too low to enable them to make such loans profitably. The remaining 33 States have either created a carve-out from their general usury cap for payday loans

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[24] Bd. of Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S. Households in 2017*, at 2, 5, 7, 21, 23 (May 2018), https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf; and Bd. of Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S. Households in 2017, Appendix A: Survey Questionnaire*, https://www.federalreserve.gov/publications/appendix-a-survey-questionnaire.htm. These represent improvements from the 2016 survey relied upon in the 2017 Final Rule. *See* 82 FR 54472, 54474 & n.9, *citing* Bd. of Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S. Households in 2016*, at 2, 8 (May 2017), https://www.federalreserve.gov/publications/files/2016-report-economic-well-being-us-households-201705.pdf.

[25] 82 FR 54472, 54475.

or do not regulate interest rates on loans.[26] Several States that previously authorized payday lending have, over the past several years, changed their laws to restrict payday lending.[27]

States that permit payday lending have chosen to adopt a variety of limitations, including regulations of the maximum price,[28] minimum loan term,[29] maximum loan amount,[30] the

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[26] *See, e.g.*, *id.* at 54477 & n.25. The 2017 Final Rule cited 35 payday authorizing States, counting New Mexico among those States. At the time the rule was issued, New Mexico had enacted a law which had not yet taken effect, prohibiting short-term payday lending. Now that the law is in effect, New Mexico is no longer counted here. Recently, Ohio enacted a law that, when implemented on April 27, 2019, will effectively prohibit short-term payday and vehicle title lending. Because the Ohio law has not yet been implemented, Ohio is counted as a payday authorizing State and references herein refer to current Ohio law. *See* Ohio House Bill 123, *An Act to Modify the Short-Term Loan Act,* https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-123; https://www.com.ohio.gov/documents/fiin_HB123_Guidance.pdf.

[27] *See, e.g.,* 82 FR 54472, 54485-86. In addition, most recently, voters in Colorado approved a ballot initiative on November 6, 2018 to cap annual percentage rates (APRs) on payday loans at 36 percent. This initiative takes effect February 1, 2019, shortly before the release of this NPRM. Colorado is now counted here as a State prohibiting short-term payday lending. *See* Colo. Legislative Council Staff, *Initiative #126 Initial Fiscal Impact Statement*, https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2017-2018/126FiscalImpact.pdf; *see also* Colo. Sec'y of State, *Official Certified Results—State Offices & Questions,* https://results.enr.clarityelections.com/CO/91808/Web02-state.220747/#/c/C_2 (Proposition 111).

[28] Of the States that expressly authorize payday lending, Rhode Island has the lowest cap at 10 percent of the loan amount. R.I. Gen. Laws § 19-14.4-4(4). Florida caps fees at 10 percent of the loan amount plus a flat $5 database verification fee. Fla. Stat. Ann. § 560.404(6). Oregon's fees are $10 per $100 capped at $30 plus 36 percent interest. Or. Rev. Stat. § 725A.064(1) & (2). Some States have tiered caps depending on the size of the loan. Generally, in these States the cap declines with loan size. However, in Mississippi, the cap is $20 per $100 for loans under $250 and $21.95 for loans up to $500 (the State maximum). Miss. Code Ann. § 75-67-519(4). Six States do not cap fees on payday loans or are silent on fees: Delaware, Idaho, Nevada, Texas (no cap on credit access business fees added to interest on loans), Utah, and Wisconsin. Del. Code Ann. tit. 5, § 2229; Idaho Code § 28-46-412(3); Nev. Rev. Stat. Ann. § 675.365; Tex. Fin. Code Ann. § 393.602(b); Utah Code Ann. § 7-23-401; Wis. Stat. Ann. § 138.14(10)(a). *See also* 82 FR 54472, 54477 & n.31.

[29] For example, Washington requires the due date to be on or after the borrower's next pay date, but if the pay date is within seven days of taking out the loan, the due date must be on the second pay date after the loan is made. Wash. Rev. Code Ann. § 31.45.073(2). *See also* 82 FR 54472, 54478 & n.35.

[30] At least 18 States cap payday loan amounts between $500 and $600 (Alabama, Alaska, Florida, Hawaii, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, and Virginia). Ala. Code § 5-18A-12(a); Alaska Stat. § 06.50.410; Fla. Stat. Ann. § 560.404(5); Haw. Rev. Stat. § 480F-4(c); Iowa Code Ann. § 533D.10(1)(b); Kan. Stat. Ann. § 16a-2-404(1)(c); Ky. Rev. Stat. Ann. § 286.9-100(9); Mich. Comp. Laws Ann. § 487.2153(1); Miss. Code Ann. § 75-67-519(2); Mo. Rev. Stat. § 408.500(1); Neb. Rev. Stat. § 45-919(1)(b); N.D. Cent. Code § 13-08-12(3); Ohio Rev. Code Ann. § 1321.39(A); Okla. Stat. Ann. tit. 59, § 3106(7); R.I. Gen. Laws § 19-14.4-5.1(a); S.C. Code Ann. § 34-39-180(B); Tenn. Code Ann. § 45-17-112(o); Va. Code Ann. § 6.2-1816(5). California limits payday loans to $300 (including the fee), and Delaware caps loans at $1,000. Cal. Fin. Code § 23035(a); Del. Code Ann. tit. 5, § 2227(7). States that limit the loan amount to the lesser of one percent of the borrower's income or a fixed-dollar amount include Idaho (25 percent or $1,000), Illinois (25 percent or $1,000), Indiana (20 percent or $550), Washington (30 percent or $700), and Wisconsin (35 percent or $1,500). Idaho Code Ann. § 28-46-413(1)-(2); 815 Ill. Comp. Stat. 122/2-5(e); Ind. Code §§ 24-4.5-7-402, 404; Wash. Rev. Code § 31.45.073(2); Wis. Stat. Ann. § 138.14(12)(b). At least one

maximum number of loans that can be made to an individual consumer (loan cap),[31] the maximum number of times that a consumer may renew or roll over a loan,[32] and the length of time between loans (cooling-off periods).[33] In addition, at least 16 States have adopted laws requiring payday lenders to offer borrowers the option of taking an extended repayment plan when encountering difficulty in repaying the loan.[34] These State laws represent the judgment of

State, Nevada, caps the maximum payday loan at 25 percent of the borrower's gross monthly income. Nev. Rev. Stat. § 604A.5017. A few States' laws (*e.g.*, Utah and Wyoming) are silent as to the maximum loan amount. Utah Code Ann. § 7-23-401; Wyo. Stat. Ann. § 40-14-363. *See also* 82 FR 54472, 54477 & n.27.

[31] Washington limits consumers to no more than eight loans from all lenders in a rolling 12-month period. *See* Wash. Dep't of Fin. Insts., *2017 Payday Lending Report*, at 7, https://dfi.wa.gov/sites/default/files/reports/2017-payday-loan-report.pdf. Delaware, a State with no fee restrictions for payday loans, restricts consumers to five payday loans, including rollovers, in a 12-month period. Del. Code Ann. tit. 5, §§ 2227(7), 2235A(a)(1). *See also* 82 FR 54472, 54486 & nn.128, 129.

[32] States that prohibit rollovers include California, Florida, Hawaii, Illinois, Indiana, Kentucky, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, South Carolina, Tennessee, Virginia, Washington, and Wyoming. Cal. Fin. Code § 23037(a); Fla. Stat. Ann. § 560.404(18); Haw. Rev. Stat. § 480F-4(d); 815 Ill. Comp. Stat. 122/2-30; Ind. Code § 24-4.5-7-402(7); Ky. Rev. Stat. Ann. § 286.9-100(14); Mich. Comp. Laws Ann. § 487.2155(1); Minn. Stat. Ann. § 47.60(2)(f); Miss. Code Ann. § 75-67-519(5); Neb. Rev. Stat. § 45-919(1)(f); Okla. Stat. Ann. tit. 59, § 3109(A); S.C. Code Ann. § 34-39-180(F); Tenn. Code Ann. § 45-17-112(q); Va. Code Ann. § 6.2-1816(6); Wash. Rev. Code Ann. § 31.45.073(2); Wyo. Stat. Ann. § 40-14-364. Other States such as Iowa and Kansas restrict a loan from being repaid with the proceeds of another loan; Wisconsin limits such loans. Iowa Code Ann. § 533D.10(1)(e); Kan. Stat. Ann. § 16a-2-404(6); Wis. Stat. Ann. § 138.14 (12)(a). Other States that permit some limited degree of rollovers include Alabama (one); Alaska (two); Delaware (four); Idaho (three); Missouri (six if there is at least 5 percent principal reduction on each rollover); Nevada (may extend loan up to 60 days after the end of the initial loan term); North Dakota (one); Oregon (two); Rhode Island (one); and Utah (allowed up to 10 weeks after the execution of the first loan). Ala. Code § 5-18A-12(b); Alaska Stat. § 06.50.470(b); Del. Code Ann. tit. 5, § 2235A(a)(2); Idaho Code Ann. § 28-46-413(9); Mo. Rev. Stat. § 408.500(6); Nev. Rev. Stat. § 604A.5029(1); N.D. Cent. Code § 13-08-12(12); Or. Rev. Stat. § 725A.064(6); R.I. Gen. Laws § 19-14.4-5.1(g); Utah Code Ann. § 7-23-401(4)(c). *See also* 82 FR 54472, 54478 & n.37.

[33] States with cooling-off periods include Alabama (next business day after a rollover is paid in full); Florida (24 hours); Illinois (seven days after a consumer has had payday loans for more than 45 days); Indiana (seven days after five consecutive loans); North Dakota (three business days); Ohio (one day with a two loan limit in 90 days, four per year); Oklahoma (two business days after fifth consecutive loan); Oregon (seven days); South Carolina (one business day between all loans and two business days after seventh loan in a calendar year); Virginia (one day between all loans, 45 days after fifth loan in a 180-day period, and 90 days after completion of an extended payment plan or extended term loan); and Wisconsin (24 hour after renewals). Ala. Code § 5-18A-12(b); Fla. Stat. Ann. § 560.404(19); 815 Ill. Comp. Stat. 122/2-5(b); Ind. Code § 24-4.5-7-401(2); N.D. Cent. Code § 13-08-12(4); Ohio Rev. Code Ann. § 1321.41(E), (N), (R); Okla. Stat. Ann. tit. 59, § 3110; Or. Rev. Stat. § 725A.064(7); S.C. Code Ann. § 34-39-270(A), (B); Va. Code Ann. § 6.2-1816(6); Wis. Stat. Ann. § 138.14(12)(a). *See also* 82 FR 54472, 54478 & n.39.

[34] States with statutory extended repayment plans include Alabama, Alaska, Florida, Idaho, Illinois, Indiana, Louisiana, Michigan (fee permitted), Nevada, Oklahoma (fee permitted), South Carolina, Utah, Virginia, Washington, Wisconsin, and Wyoming. Florida also requires that, as a condition of providing a repayment plan

the various States as to the limitations, if any, that should be placed on the terms pursuant to which consumers have the ability to choose payday loans within their respective jurisdictions.

Changes to State-level regulation as described above may have contributed to the decline in payday lending complaints the Bureau handled through its Consumer Response database. As cited in the 2017 Final Rule, in 2016 the Bureau handled approximately 4,400 complaints in which consumers reported "payday loan" as the complaint product.[35] In contrast, the Bureau received approximately 2,900 payday loan complaints in 2017, and approximately 2,300 in 2018.[36] In each of these reporting years, it appears that consumers complained most frequently about unexpected fees associated with payday loans, while consumers complaining about receiving a loan for which payday lenders had not determined their ability to repay loans were less frequent.

The primary channel through which consumers obtain payday loans, as measured by total dollar volume, is through State-licensed storefront locations. Nevertheless, as discussed in the

(called a grace period), borrowers make an appointment with a consumer credit counseling agency and complete counseling by the end of the plan. Ala. Code § 5-18A-12(c); Alaska Stat. § 06.50.550(a); Fla. Stat. Ann. § 560.404(22)(a); Idaho Code Ann. § 28-46-414; 815 Ill. Comp. Stat. 122/2-40; Ind. Code § 24-4.5-7-401(3), 404; La. Rev. Stat. Ann. § 9:3578.4.1; Mich. Comp. Laws Ann. § 487.2155(2); Nev. Rev. Stat. § 604A.5027(1); Okla. Stat. tit. 59, § 3109(D); S.C. Code Ann. § 34-39-280; Utah Code Ann. § 7-23-403; Va. Code Ann. § 6.2-1816(26); Wash. Rev. Code Ann. § 31.45.084(1); Wis. Stat. Ann. § 138.14(11)(g); Wyo. Stat. Ann. § 40-14-366(a). *See* also 82 FR 54472, 54478 & n.40.

[35] Bureau of Consumer Fin. Prot., *Consumer Response Annual Report, Jan. 1 – Dec. 31, 2016,* at 33 (March 2017), https://www.consumerfinance.gov/documents/3368/201703_cfpb_Consumer-Response-Annual-Report-2016.PDF.

[36] Bureau of Consumer Fin. Prot., *Consumer Response Annual Report, Jan. 1 – Dec. 31, 2017,* at 34 (March 2018), https://www.consumerfinance.gov/documents/6406/cfpb_consumer-response-annual-report_2017.pdf; Bureau of Consumer Fin. Prot. Consumer Response Database. To provide a sense of the number of complaints for payday loans relative to the number of complaints for other product categories, from October 1, 2017 through September 30, 2018, approximately 0.7 percent of all consumer complaints the Bureau received were about payday loans, and 0.2 percent were about vehicle title loans. Bureau of Consumer Fin. Prot., *Fall 2018 Semi-Annual Report of the Bureau of Consumer Financial Protection*, at 25 (forthcoming Feb. 2019). The Bureau notes that there is some overlap across product categories, for example, a consumer complaining about the conduct of a debt collector seeking to recover on a payday loan would be in the debt collection product category rather than the payday loan product category.

2017 Final Rule, the online payday loan industry generates about 50 percent of total payday loan revenue.[37] According to one industry analyst, there were an estimated 14,348 storefronts in 2017, down from the industry's peak of over 24,000 stores ten years earlier.[38] In the 2017 Final Rule, the Bureau noted that there were at least 10 payday lenders with approximately 200 or more storefront locations.[39] The Bureau also estimated that there were over 2,400 storefront payday lenders that are small businesses as defined by the Small Business Administration (SBA).[40]

Studies seeking to determine the number of consumers who use payday loans annually have come up with a wide range of estimates, from 2.2 million households[41] to 12 million

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[37] *See* 82 FR 54472, 54487 and John Hecht, *Short Term Lending Update: Moving Forward with Positive Momentum* (2018) (Jefferies LLC, slide presentation) (on file).

[38] *See* John Hecht, *Short Term Lending Update: Moving Forward with Positive Momentum* (2018) (Jefferies LLC, slide presentation) (on file). In 2017 Final Rule, the Bureau cited the same analyst's estimate of 16,480 payday storefronts in 2015. *See* 82 FR 54472, 54480 & n.53.

[39] 82 FR 54472, 54479 & n.49. These lenders include ACE Cash Express, Advance America, Amscot Financial, Axcess Financial (including brands Check 'n Go, Allied Cash), Check Into Cash, Community Choice Financial (including brand Checksmart), CURO Financial Technologies (including brand Speedy Cash), DFC Global Corp (Money Mart), FirstCash, and QC Holdings. Additional payday lenders with at least 200 storefront locations include Cash Express, LLC and Cottonwood Financial dba Cash Store. *See* ACE Cash Express, "Store Locator," https://www.acecashexpress.com/locations; Advance America, "Find an Advance America Store Location," https://www.advanceamerica.net/store-locations; Amscot Financial, Inc., "Amscot Locations," https://www.amscot.com/locations.aspx; Check 'n Go, "State Center," https://www.checkngo.com/resources/state-center; Allied Cash Advance, "Allied Cash Advance Store Directory," https://locations.alliedcash.com/index.html; Check Into Cash, "Payday Loan Information By State," https://checkintocash.com/payday-loan-information-by-state; Community Choice Financial (Checksmart), "Locations," https://www.ccfi.com/locations/; SpeedyCash, "Speedy Cash Stores Near Me," https://www.speedycash.com/find-a-store; Money Mart Financial Services, "Home," http://www.moneymartfinancialservices.com/index.html; FirstCash Inc., "Find a Location Near You," http://www.firstcash.com/; QC Holdings, Inc., "United States Retail Operations," https://www.qchi.com/productsandservices/usa/retail/; *see* Cash Express, LLC, https://www.cashtn.com/; *see also* https://www.consumerfinance.gov/about-us/newsroom/bureau-consumer-financial-protection-settles-cash-express/ (noting approximately 328 retail lending outlets); Cottonwood Financial dba Cash Store, https://www.cashstore.com/cash-advance-lender-about-us (all last visited Feb. 4, 2019).

[40] 82 FR 54472, 54479 & n.52. The number of storefront payday lenders classified as small businesses has likely declined to some extent, continuing the trend noted over the last several years. *See id*. at 54480 & n.53.

[41] *See* Fed. Deposit Ins. Corp., *2017 FDIC National Survey of Unbanked and Underbanked Households*, at 41 (Oct. 2018), https://www.fdic.gov/householdsurvey/2017/2017report.pdf. This is a reduction from the 2015 numbers of 2.5 million households cited in the 2017 Final Rule; *see* 82 FR 54472, 54479 & n.42, *citing* Fed. Deposit Ins. Corp.,

individuals.[42] Given the number of storefronts and the average number of customers per storefront plus the presence of the large online market for payday loans, the actual number of borrowers appears closer to the higher end of the estimates and is cited by at least one industry trade association.[43]

A number of studies have focused on the characteristics of payday borrowers and have found that they typically come from low and moderate income households.[44] The Bureau's own research found that 18 percent of storefront borrowers relied on Social Security or some other form of government benefits or public assistance.[45]

Studies of payday borrowers show poor credit histories, limited credit availability, and recent credit-seeking activity.[46] For example, a report analyzing credit scores of borrowers from five large storefront payday lenders and a number of online lenders found that the average storefront borrower had a VantageScore 3.0 score of 532 and that the average online borrower had a score of 525.[47] An academic paper that matched administrative data (*i.e.*, data that is

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2015 FDIC National Survey of Unbanked and Underbanked Households, at 2, 34 (Oct. 20, 2016), https://www.fdic.gov/householdsurvey/2015/2015report.pdf.

[42] 82 FR 54472, 54479 & n.44, *citing* Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why*, at 4 (July 2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.

[43] Community Financial Services of America, a trade association representing payday and small-dollar lenders, states that approximately 12 million Americans use small dollar loans each year. *See* https://www.cfsaa.com/ (last visited Feb, 4, 2019). The 2017 Final Rule pointed to one study estimating, based on administrate State data from three States, that the average payday store served around 500 customers per year. 82 FR 54472, 54480 & n.59 citing Pew Charitable Trusts, *Payday Lending in America: Policy Solutions*, at 18 (Report 3, 2013) https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2013/pewpaydaypolicysolutionsoct2013pdf.pdf.

[44] *See* 82 FR 54472, 54556-57 (citing studies discussed in text).

[45] *See id.* at 54556 & n.469, referencing the Bureau's analysis of confidential supervisory data in Bureau of Consumer Fin. Prot., *Payday Loans and Deposit Advance Products—A White Paper of Initial Data Findings*, at 18 (2013), https://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf.

[46] *See* 82 FR 54472, 54557 (citing studies discussed in text).

[47] *See id.* at 54557, nn.480, 482, *citing* nonPrime101, *Report 8: Can Storefront Payday Borrowers Become Installment Loan Borrowers? Can Storefront Payday Lenders Become Installment Lenders?*, at 5, 7 (2015) (on file).

collected or obtained from an organization's or institution's own records and operations) from one storefront payday lender to credit bureau data found that 80 percent of payday applicants had either no credit card or no credit available on a card.[48] The average borrower had 5.2 credit inquiries on her credit report over the 12 months preceding her initial application for a payday loan (three times the number for the general population), but obtained only 1.4 accounts on average.[49]

Surveys of payday borrowers add to the picture of a substantial portion of consumers in financial distress.[50] For example, in a survey of payday borrowers published in 2009, fewer than half reported having any savings or reserve funds.[51] Similarly, a 2007 survey found that over 80 percent of payday borrowers reported making at least one late payment on a bill in the preceding three months, and approximately one quarter reported frequently paying bills late.[52] Approximately half reported bouncing at least one check in the previous three months, and 30

A VantageScore 3.0 score is a credit score created by an eponymous joint venture of the three major credit reporting companies; scores lie in the range of 300-850. *See* 82 FR 54472, 54557 n.479. By way of comparison, the national average VantageScore in 2017 was 675 and only 21.2 percent of consumers have a VantageScore below 600. Experian, *State of Credit: 2017* (2018), https://www.experian.com/blogs/ask-experian/state-of-credit/.

[48] *See* 82 FR 54472, 54557 & n.477, *citing* Neil Bhutta et al., *Consumer Borrowing after Payday Loan Bans*, 59 J. of L. and Econ. 225, at 231-233 (2016). Note that the credit score used in this analysis was the Equifax Risk Score which ranges from 280-850. Frederic Huynh, *FICO Score Distribution*, FICO Blog (Apr. 15, 2013), http://www.fico.com/en/blogs/risk-compliance/fico-score-distribution-remains-mixed/.

[49] 82 FR 54472, 54557 & n.478, *citing* Neil Bhutta et al., *Consumer Borrowing after Payday Loan Bans*, 59 J. of L. & Econ. 225, at 231-233 (2016).

[50] 82 FR 54472, 54458 (citing surveys referenced in text).

[51] *Id.* at 54458 & n.485, *citing* Gregory Elliehausen, *An Analysis of Consumers' Use of Payday Loans*, at 29 (Geo. Wash. Sch. of Bus., Monograph No. 41, 2009), https://www.researchgate.net/publication/237554300_AN_ANALYSIS_OF_CONSUMERS%27_USE_OF_PAYDAY_LOANS.

[52] 82 FR 54472, 54558 & n.486, *citing* Jonathan Zinman, *Restricting Consumer Credit Access: Household Survey Evidence on Effects Around the Oregon Rate Cap*, at 20 tbl. 1 (Dartmouth College, 2008), http://www.dartmouth.edu/~jzinman/Papers/Zinman_RestrictingAccess_oct08.pdf.

percent reported doing so more than once.[53] Furthermore, a 2012 survey found that 58 percent of payday borrowers report that they struggle to pay their bills on time.[54]

According to Bureau research, payday loan borrowers typically borrow relatively small amounts, with a median loan size of $350.[55] As the Bureau observed in the 2017 Final Rule, understanding why borrowers take out a payday loan is challenging for several reasons. For example, because money is fungible, a consumer who has an unexpected expense may not feel the effect fully until weeks later and thus, when surveyed, may say either that she took out the loan because of the unexpected expense, or that she took out the loan to cover a bill that had come due and for which she was short of cash.[56] Perhaps because of this difficulty, results across surveys are somewhat inconsistent, with one finding that unexpected expenses were driving a large share of payday borrowing, while others finding that payday loans are used primarily to pay for regular expenses such as rent, utilities, or other bills.[57]

Research by the Bureau found that 80 percent to 85 percent of payday borrowers succeed in repaying their loans.[58] Of these, the Bureau found that between 22 percent and 30 percent do

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[53] *Id.*

[54] 82 FR 54472, 54558 & n.487, *citing* Pew Charitable Trusts, *Payday Lending in America: How Borrowers Choose and Repay Payday Loans*, at 9 (Report 2, 2013), http://www.pewtrusts.org/en/research-and-analysis/reports/2013/02/19/how-borrowers-choose-and-repay-payday-loans.

[55] 82 FR 54472, 54477 & n.28, *citing* Bureau of Consumer Fin. Prot., *Payday Loans and Deposit Advance Products—A White Paper of Initial Data Findings*, at 15 (2013), https://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf.

[56] 82 FR 54472, 54558.

[57] *Id.*; *see also id.* at 54558-59 (citing and discussing surveys).

[58] Bureau of Consumer Fin. Prot., *Supplemental findings on payday, payday installment, and vehicle title loans and deposit advance products*, at 120 (June 2016), https://www.consumerfinance.gov/documents/329/Supplemental_Report_060116.pdf (hereinafter, Supplemental Findings).

so after receiving a single loan while the remainder repaid after reborrowing one or more times.[59] Of those who defaulted, according to the Bureau's research, roughly 30 percent did so when the loan was initially due while the remainder defaulted after taking out one or more subsequent loans.[60] The Bureau found that borrowers end up taking out at least four loans in a row 43 to 50 percent of the time, taking out at least seven loans in a row 27 to 33 percent of the time, and taking out at least 10 loans in a row 19 to 24 percent of the time.[61] The average payday loan sequence, according to Bureau research, is between 5 and 6 loans.[62]

A longitudinal report by a specialty consumer reporting agency following 1,000 borrowers conducted over 4.5 years found that 30 percent of the original 1,000 borrowers used payday loans persistently over the full observation period.[63] For the persistent borrowers, the average number of loan sequences was approximately 7.3 and these borrowers had a payday loan outstanding about 60 percent of the time.[64] Of the original borrowers who did not use payday loans persistently during the observation period, the average number of loan sequences was approximately 4.5.[65]

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[59] *Id.* The Bureau looked at repayment rates over loan "sequences" and analyzed outcomes using a 14-day definition of a loan sequence (*i.e.,* treating loans made within 14 days of a prior loan as part of a single sequence) and, alternatively, a 30-day definition. The higher repayment rates are from the 14-day definition.

[60] *Id.*

[61] *Id.* at 123.

[62] *Id.* at 117.

[63] *See* 82 FR 54472, 54836, *citing* nonPrime 101, *Report 7C: A Balanced View of Storefront Payday Borrowing Patterns*, at tbl. A-7 (2016) (on file); *see also id*. at 6 (tbl.3), 11. The study sought to have a constant population of 1,000 borrowers. Borrowers who left during the time period of the study were replaced by new borrowers to maintain a constant population 1,000 borrowers. *Id.* at 3. For the study's definition of "persistent borrower," see *id.* at 4.

[64] nonPrime101, *Report 7C: A Balanced View of Storefront Payday Borrowing Patterns*, at 3, 6 (2016) (on file); *see also id.* at 14-15 & fig. 42.

[65] *Id.* at 6 & tbl. 3.

2. Single-Payment Vehicle Title Loans

The second major category of loans covered by the Mandatory Underwriting Provisions of the 2017 Final Rule is single-payment vehicle title loans. As explained in the 2017 Final Rule, in a title loan transaction, the borrower must provide identification and usually the title to the vehicle as evidence that the borrower owns the vehicle "free and clear."[66] The lender retains the vehicle title or some other form of security interest during the duration of the loan, while the borrower retains physical possession of the vehicle.[67] Single-payment vehicle title loans are typically due in 30 days.[68]

As with payday loans, the States have taken different regulatory approaches with respect to single-payment vehicle title loans. Seventeen States currently permit single-payment vehicle title lending.[69] Another six States permit title installment loans but those loans are not affected by the Mandatory Underwriting Provisions of the 2017 Final Rule.[70] Three States (Arizona,

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[66] 82 FR 54472, 54489.

[67] *See id.* at 54490. *See also, e.g.,* Speedy Cash, *Title Loans FAQs*, https://www.speedycash.com/faqs/title-loans (last visited Feb. 4. 2019); TitleMax, *Answers to Your Questions about Title Loans*, https://www.titlemax.com/faqs (last visited Feb. 4, 2019).

[68] *See* 82 FR 54472, 54490 & n.181, *citing* Pew Charitable Trusts, *Auto Title Loans—Market practices and borrowers' experiences* (2015), https://www.pewtrusts.org/~/media/assets/2015/03/autotitleloansreport.pdf. *See also* Idaho Dep't of Fin., *Idaho Credit Code 'Fast Facts,'* https://www.finance.idaho.gov/ConsumerFinance/Documents/Idaho-Credit-Code-Fast-Facts-With-Fiscal-Annual-Report-Data-01012015.pdf; Tenn. Dep't of Fin. Inst., *2018 Report on the Title Pledge Industry*, at 4 (Apr. 23, 2018) https://www.tn.gov/content/dam/tn/financialinstitutions/new-docs/TP%20Annual%20Report%202018.pdf.

[69] As noted in the 2017 Final Rule, New Mexico had enacted a law in 2017, effective January 1, 2018, that prohibits single-payment vehicle title loans and allows only installment title lending. New Mexico is no longer counted as one of the States authorizing single-payment vehicle title loans. *See* 82 FR 54472, 54490. Ohio is counted as one of the 17 States but as noted above, a bill signed by the governor in 2018 will prohibit lenders from making loans of $5,000 or less secured by a vehicle title or any other collateral. Ohio lenders must comply with the law as of April 27, 2019. *See* https://www.com.ohio.gov/documents/fiin_HB123_Guidance.pdf; *see also* Ohio House Bill 123, *An Act to Modify the Short-Term Loan Act,* https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-123.

[70] *See* 82 FR 54472, 54490. New Mexico is now counted in this group as the State allows only title installment lending.

Georgia, and New Hampshire) permit single-payment vehicle title loans but prohibit or substantially restrict payday loans.[71] As with State restrictions on payday loans, these State vehicle title laws represent the judgment of the various States as to the limitations, if any, that should be placed on consumers' ability to choose vehicle title loans within their respective jurisdictions.

Also as with payday loans, some of the States that permit single-payment vehicle title loans have adopted a variety of regulatory provisions governing such loans, including limitations on the maximum price[72] and maximum loan size.[73] A few States regulate reborrowing with either a cooling-off period between loans or a mandatory minimum amortization.[74] A number of State laws contain provisions addressing default and repossession including cure provisions and provisions governing deficiencies or surpluses if a vehicle is repossessed and sold.[75]

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[71] *Id.*

[72] States with a 15 percent to 25 percent per month rate cap include Alabama, Georgia (rate decreases after 90 days), Mississippi, and New Hampshire. Ala. Code § 5-19A-7(a); Ga. Code Ann. § 44-12-131(a)(4); Miss. Code Ann. § 75-67-413(1); N.H. Rev. Stat. Ann. § 399-A:18(I)(f). Tennessee limits interest rates to 2 percent per month, but also allows for a fee up to 20 percent of the original principal amount. Tenn. Code Ann. § 45-15-111(a). Virginia's fees (installment title loans) are tiered at 22 percent per month for amounts up to $700 and then decrease on larger loans. Va. Code Ann. § 6.2-2216(A). *See also* 54472, 54490 & n.184.

[73] For example, some maximum vehicle title loan amounts are $2,500 in Mississippi and Tennessee, and $5,000 in Missouri. Miss. Code Ann. § 75-67-415(f); Tenn. Code Ann. § 45-15-115(3); Mo. Rev. Stat. § 367.527(2). Illinois limits the loan amount to $4,000 or 50 percent of monthly income, Virginia (installment title loans) and Wisconsin limit the loan amount to 50 percent of the vehicle's value and Wisconsin also has a $25,000 maximum loan amount. Ill. Admin. Code tit. 38, § 110.370(a); Va. Code Ann. § 6.2-2215(1)(d); Wis. Stat. Ann. § 138.16(1)(c), (2)(a). Examples of States with no limits on loan amounts, limits of the amount of the value of the vehicle, or statutes that are silent about loan amounts include Arizona, Idaho, and Utah. Ariz. Rev. Stat. Ann. § 44-291(A); Idaho Code Ann. § 28-46-508(3); Utah Code Ann. § 7-24-202(3)(c). *See also* 82 FR 54472, 54491.

[74] Illinois requires 15 days between title loans. Ill. Admin. Code tit. 38, § 110.370(c). Delaware requires title lenders to offer a workout agreement after default but prior to repossession that repays at least 10 percent of the outstanding balance each month. Delaware does not cap fees on title loans and interest continues to accrue on workout agreements. Del. Code Ann. tit. 5, §§ 2255, 2258. New Hampshire law prohibits title lenders from making a title loan within 60 days of a prior payday or title loan and title loan renewals are permitted up to nine times with at least 10 percent amortization of the original balance owed. N.H. Rev. Stat. Ann. §§ 399-A:18.I(e), 399-A:19.II. *See also* 82 FR 54472, 54491 & n.185.

[75] For example, Georgia allows repossession fees and storage fees. Ga. Code Ann. § 44-12-131(a)(4)(C). Arizona, Delaware, Idaho, Missouri, South Dakota, Tennessee, Utah, Virginia, and Wisconsin specify that any surplus must

As explained in the 2017 Final Rule, information about the vehicle title market is more limited than the storefront payday industry.[76] There are approximately 8,000 title loan storefront locations in the United States, about half of which also offer payday loans.[77] Of those locations that predominantly offer vehicle title loans, three privately held firms dominate the market and together account for approximately 3,000 stores in over 20 States.[78] In addition to the large title lenders, the Bureau estimated that there are about 800 vehicle title lenders that are small businesses as defined by the SBA.[79]

The available evidence suggests that between 1.8 million households and 2 million adults use vehicle title loans annually, although these studies do not necessarily differentiate between single-payment and installment vehicle title loans.[80] The demographic profiles of vehicle title

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be returned to the borrower. Ariz. Rev. Stat. Ann. § 47-9608(A)(4); Del. Code Ann. tit. 5, § 2260; Idaho Code Ann. § 28-9-615(d); Mo. Rev. Stat. § 408.553; S.D. Codified Laws § 54-4-72; Tenn. Code Ann. § 45-15-114(b)(2); Utah Code Ann. § 7-24-204(3); Va. Code Ann. § 6.2-2217(C); Wis. Stat. § 138.16(4)(e). Mississippi requires that 85 percent of any surplus be returned. Miss. Code Ann. § 75-67-411(5). *See also* 82 FR 54472, 54491 & n.188.

[76] 82 FR 54472, 54491.

[77] *See id.* at 54491 & n.197, *citing* Pew Charitable Trusts, *Auto Title Loans—Market practices and borrowers' experiences* (2015), https://www.pewtrusts.org/~/media/assets/2015/03/autotitleloansreport.pdf.

[78] The largest vehicle title lender is TMX Finance, LLC, formerly known as Title Max Holdings, LLC, with about 1,200 stores. *See* https://www.titlemax.com/store-locator/ and https://www.titlebucks.com/store-locator/ (last visited Feb. 4, 2019) (TMX Finance has stores in 16 States and TitleBucks has stores in 6 States); *see also* Community Loans of America, https://clacorp.com/about-us (last visited Feb. 4, 2019) (over 1,000 locations in 25 States); Select Management Resources (roughly 600 stores) (Select Management Resources brands include LoanMax, LoanStar Title Loans, Midwest Title Loans, and North American Title Loans), https://www.loanmaxtitleloans.net/SiteMap, https://www.loanstartitleloans.net/SiteMap, https://www.midwesttitleloans.net/SiteMap, https://www.northamericantitleloans.net/SiteMap (all last visited Feb. 4, 2019). Store counts for these three firms may include States with stores that offer installment vehicle title loans.

[79] 82 FR 54472, 54492 & n.200, explaining that State reports have been supplemented with estimates from Center for Responsible Lending, revenue information from public filings, and from non-public sources. *See* Jean Ann Fox et al., *Driven to Disaster: Car-Title Lending and Its Impact on Consumers*, at 7 (Consumer Fed'n of Am. and Ctr. for Responsible Lending, 2013), https://www.responsiblelending.org/other-consumer-loans/car-title-loans/research-analysis/CRL-Car-Title-Report-FINAL.pdf.

[80] Fed. Deposit Ins. Corp., *2017 FDIC National Survey of Unbanked and Underbanked Households*, at 41 (Oct. 2018), https://www.fdic.gov/householdsurvey/2017/2017report.pdf. The number of households using title loans in the FDIC survey rose from the 1.7 million households reported in the 2015 survey cited in the 2017 Final Rule. *See*

borrowers appear to be roughly comparable to the demographics of payday borrowers, which is to say that they tend to be lower and moderate income.[81] In one survey, 30 percent of vehicle title borrowers reported that they struggle to meet their expenses most or all months and another 20 percent said that was true half the time.[82] The Bureau is not aware of any published research regarding the credit profiles of single-payment vehicle title borrowers.

As with payday loans, understanding the factors that cause consumers to use vehicle title loans is challenging. In one survey, 25 percent of borrowers attributed their need for a vehicle title loan to an unexpected emergency expense, 52 percent attributed their need to recurring expenses, and the remainder pointed to other expenses or did not know.[83]

Vehicle title loans differ from payday loans in at least two important respects. First, these loans enable consumers to borrow larger amounts: the Bureau's research found that the median vehicle title loan amount was $694, or roughly double the size of the median payday loan amount.[84] Second, whereas a payday loan is only available to those with a bank account or other transaction account, unbanked consumers with clear vehicle title can obtain a vehicle title loan. Indeed, some vehicle title lenders do not require a copy of a pay stub or other evidence of current income in order to make a loan.[85]

Pew Charitable Trusts, *Auto Title Loans—Market practices and borrowers' experiences*, at 33 (2015), https://www.pewtrusts.org/~/media/assets/2015/03/autotitleloansreport.pdf; 82 FR 54472, 54491 & n.195.

[81] Fed. Deposit Ins. Corp., *2017 FDIC National Survey of Unbanked and Underbanked Households* (Oct. 2018), https://www.fdic.gov/householdsurvey/2017/2017report.pdf (calculations made using custom data tool).

[82] Pew Charitable Trusts, *Auto Title Loans—Market practices and borrowers' experiences*, at 6 (2015), https://www.pewtrusts.org/~/media/assets/2015/03/autotitleloansreport.pdf.

[83] *Id.* at 7.

[84] 82 FR 54472, 54490 & n.182, *citing* Bureau of Consumer Fin. Prot., *Single-Payment Vehicle Title Lending,* (May 2016), https://files.consumerfinance.gov/f/documents/201605_cfpb_single-payment-vehicle-title-lending.pdf.

[85] 82 FR 54472, 54490 & n.174.

The Bureau's research found that roughly two-thirds of single-payment vehicle title borrowers repay their loans. Of borrowers who repaid, 12 percent of them did so when the initial loan was due and the remainder reborrowed one or more times before repaying.[86] Of borrowers who defaulted, roughly 30 percent did so when the loan was initially due, while the remainder defaulted after taking out one or more subsequent loans.[87] Borrowers end up taking out at least four loans in a row roughly 55 percent of the time, taking out at least seven loans roughly 35 percent of the time, and taking out at least 10 loans slightly over 20 percent of the time.[88]

3. Longer-Term Balloon-Payment Loans

The third category of loans covered by the Mandatory Underwriting Provisions of the 2017 Final Rule is longer-term balloon-payment loans which generally involve a series of small, often interest-only, payments followed by a single larger lump sum payment.[89] In 2017, the Bureau noted that there did not appear to be a large market for such loans. However, the Bureau expressed the concern that the market for these longer-term balloon-payment loans, with structures similar to payday loans and that pose similar risks to consumers, might grow if only covered short-term loans were regulated under the 2017 Final Rule.[90] Because the market was relatively small, the Bureau supplemented its analysis with relevant information on related types of covered longer-term loans, such as hybrid payday loans, payday installment loans, and vehicle

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[86] *Id.* at 54566 & n.531, *citing* Bureau of Consumer Fin. Prot., *Single-Payment Vehicle Title Lending*, at 11 (May 2016), https://files.consumerfinance.gov/f/documents/201605_cfpb_single-payment-vehicle-title-lending.pdf.

[87] Bureau of Consumer Fin. Prot., *Single-Payment Vehicle Title Lending*, at 11 (May 2016), https://files.consumerfinance.gov/f/documents/201605_cfpb_single-payment-vehicle-title-lending.pdf.

[88] *Id.* at 12. The percentage of vehicle title borrowers in each of the categories described in the text does not appear to vary with different definitions of loan sequences as substantially all reborrowing occurs when the loan is due.

[89] 82 FR 54472, 54475. For examples of longer-term balloon-payment loans, see *id.* at 54486 & n.143, 54490 & n.179.

[90] *Id*. at 54472, 54527-28.

title installment loans.[91] The profile of borrowers in the market for longer-term balloon-payment loans is similar to those seeking covered short-term and vehicle title loans—they also generally have low average incomes, poor credit histories, and recent credit-seeking activity.[92]

In analyzing the data that was available, the Bureau found that about 60 percent of longer-term balloon-payment loans resulted in refinancing, reborrowing, or default.[93] By contrast, nearly 60 percent of comparable fully-amortizing installment loans without a balloon-payment were repaid without refinancing or reborrowing.[94]

B. The Mandatory Underwriting Provisions of the 2017 Final Rule

The **SUPPLEMENTARY INFORMATION** accompanying the 2017 Final Rule provides an explanation of the Mandatory Underwriting Provisions of the Rule. This part II.B provides a high-level summary of certain of those provisions that are most directly relevant to the Bureau's decision to propose their reconsideration. The Bureau's rationale for the Mandatory Underwriting Provisions, as set forth in the **SUPPLEMENTARY INFORMATION** accompanying the 2017 Final Rule, is discussed in part V.A below.

As noted above, the 2017 Final Rule contains, in § 1041.4, an identification provision which provides that it is an unfair and abusive practice for a lender to make covered short-term loans or covered longer-term balloon-payment loans without reasonably determining that the consumers will have the ability to repay the loans according to their terms.

Section 1041.5 contains a set of underwriting requirements adopted to prevent the unfair and abusive practice. Specifically, § 1041.5(c)(2) requires lenders making covered short-term or

[91] *Id.* at 54580.

[92] *Id.* at 54581.

[93] *Id.* at 54582.

[94] *Id.*

longer-term balloon-payment loans to obtain a written statement from the consumer with respect to the consumer's net income and major financial obligations; obtain verification evidence of the consumer's income, if reasonably available, and major financial obligations; obtain a report from a national consumer reporting agency and a report from a registered information system with respect to the consumer; and review its own records and the records of its affiliates for evidence of the consumer's required payments under any debt obligations. Using these inputs, the lender is generally required pursuant to § 1041.5(b) and (c)(1) to make a reasonable projection of the consumer's net income and payments for major financial obligations over the ensuing 30 days; calculate either the consumer's debt-to-income ratio or the consumer's residual income; estimate the consumer's basic living expenses; and determine based upon the debt-to-income or residual income calculations whether the consumer will be able to make the payments for his or her payment obligations and the payments under the covered loan and still meet the consumer's basic living expenses during the term of the loan and for a period of 30 days thereafter.[95]

This determination is required each time a consumer returns to take out a new loan, although pursuant to § 1041.5(c)(2)(ii)(D) the lender generally need not obtain a new national credit report if one was obtained within the prior 90 days. If a consumer has obtained three loans each within 30 days of the prior loan, pursuant to § 1041.5(d)(2) the lender cannot make another covered short-term or longer-term balloon-payment loan for a period of 30 days.

As also noted above, the 2017 Final Rule contains a conditional exemption in § 1041.6 which allows lenders to make covered short-term loans without an ability-to-repay determination under § 1041.5. In order to qualify for the conditional exemption, pursuant to § 1041.6(b)(1)(i), the principal cannot exceed $500 for the first in a sequence of covered short-term loans, and

[95] The Rule defines "basic living expenses" and "major financial obligations." *See* 12 CFR 1041.5(a)(1) and (3).

pursuant to § 1041.6(b)(3) the conditional exemption is not available for vehicle title loans. A lender may not make more than three loans in succession under this conditional exemption and the loans must provide for a "principal step-down" over the sequence pursuant to § 1041.6(b)(1)(ii) and (iii) such that the second loan in a sequence can be for only two-thirds of the amount of the initial loan and the third loan in a sequence for one-third of the initial loan amount.

Pursuant to § 1041.6(c)(1), a lender cannot make a loan under the conditional exemption to a consumer who has had an outstanding covered short-term or longer-term balloon-payment loan in the preceding 30 days. Pursuant to § 1041.6(c)(3), the lender also cannot make a loan that would result in the consumer having more than six covered short-term loans outstanding during any consecutive 12-month period or result in the consumer being in debt on any covered short-term loans for longer than 90 days in any consecutive 12-month period. To verify the consumer's eligibility, before making a conditionally exempt covered short-term loan pursuant to § 1041.6(a), the lender must review the consumer's borrowing history in its own records and those of its affiliates and obtain a report from a Bureau-registered information system to determine a potential loan's compliance with § 1041.6(b) and (c).

Lenders making covered short-term and longer-term balloon-payment loans—including conditionally exempt covered short-term loans—generally are required to furnish certain information on those loans to every registered information system that has been registered with the Bureau for 180 days or more. Pursuant to § 1041.10(c)(1), certain information must be furnished no later than the date on which the loan is consummated or as close in time as feasible thereafter; pursuant to § 1041.10(c)(2), updates to such information must be furnished within a reasonable period after the event that requires the update.

In adopting the Mandatory Underwriting Provisions, the Bureau considered and rejected a number of alternatives to the Mandatory Underwriting Provisions, including requiring disclosures, adopting a payment-to-income ratio requirement, adopting one of the various State law approaches to regulating short-term loans (such as rollover caps, less detailed ability-to-repay frameworks, complete bans on short-term lending products), and other suggestions from commenters.[96]

C. The Estimated Impacts of the Mandatory Underwriting Provisions of the 2017 Final Rule

The **SUPPLEMENTARY INFORMATION** accompanying the 2017 Final Rule contains regulatory impact analyses, including an analysis of the benefits and costs to consumers and covered persons[97] as required by section 1022(b)(2)(A) of the Dodd-Frank Act (also referred to as the "section 1022(b)(2) analysis"),[98] and the final Regulatory Flexibility Act analysis (FRFA)[99] as required by that Act.[100] The Bureau does not here repeat all of that information and those findings. Rather, this part summarizes the estimates and conclusions from those analyses that the Bureau views as most relevant to its decision to propose rescinding the Mandatory Underwriting Provisions.

In the section 1022(b)(2) analysis for the 2017 Final Rule, the Bureau observed that the primary impacts of the Rule on covered persons derived mainly from the restrictions on who could obtain payday and single-payment vehicle title loans and the number of such loans that could be obtained. In order to simulate the impacts of the Mandatory Underwriting Provisions,

[96] *See* 82 FR 54472, 54636-40.

[97] *See id.* at 54814-53.

[98] 12 U.S.C. 5512(b)(2)(A).

[99] *See* 82 FR 54472, 54853-70.

[100] 5 U.S.C. 601 through 612.

the Bureau assumed, after reviewing a number of studies by the Bureau, Bureau staff, and outside researchers concerning payday borrowers, that only 33 percent of current payday and vehicle title borrowers would be able to satisfy the Rule's ability-to-pay requirement when initially applying for a loan and that for each succeeding loan in a sequence only one-third of borrowers would satisfy the mandatory underwriting requirement (*i.e.*, 11 percent of current borrowers for a second loan and 3.5 percent for a third loan).[101] Applying these assumptions to data with respect to current patterns of borrowing and reborrowing, the Bureau estimated that, absent the conditional exemption in § 1041.6, the Mandatory Underwriting Provisions of the Rule would reduce payday loan volume and lender revenue by approximately 92 to 93 percent relative to lending volumes in 2017 and vehicle title volume and lender revenue by between 89 and 93 percent.[102] Factoring in the expected effects of the conditional exemption, and assuming that payday lenders would endeavor to take full advantage of that exemption before seeking to qualify consumers for a loan under the mandatory underwriting requirements of § 1041.5, the Bureau estimated that the Mandatory Underwriting Provisions would result in a decrease in the number of payday loans of 55 to 62 percent and, because of the step-down feature of the conditional exemption, a decrease in payday lender revenue of between 71 and 76 percent.[103] Given that short-term vehicle title loans are not eligible for the conditional exemption, the Bureau estimated that the Mandatory Underwriting Provisions would result in a decrease in the number of short-term vehicle title loans of between 89 and 93 percent, with an equivalent reduction in loan volume and revenue.[104]

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[101] 82 FR 54472, 54826-34.

[102] *Id.* at 54826, 54834.

[103] *Id.* at 54826.

[104] *Id*. at 54834.

The Bureau, in its section 1022(b)(2) analysis, determined that these revenue impacts would have a substantial effect on the market. The Bureau projected that unless lenders were able to replace their reduction in revenue with other products, there would be a contraction in the number of storefronts of similar magnitude to the contraction in revenue, *i.e.,* a contraction of between 71 and 76 percent for storefront payday lenders and of between 89 and 93 percent for vehicle title lenders.[105]

In the section 1022(b)(2) analysis, the Bureau identified a number of impacts that the Mandatory Underwriting Provisions would have on consumers' ability to access credit. Specifically, the Bureau estimated that approximately 6 percent of existing payday borrowers would be unable to initiate a new loan because they would have exhausted the loans permitted under the conditional exemption and would not be able to satisfy the ability-to-repay requirement.[106] Vehicle title borrowers would be more likely to be unable to obtain an initial loan because the conditional exemption does not extend to such loans;[107] the Bureau noted that while those borrowers could pursue a payday loan, there are two States that permit vehicle title loans but not payday loans and that 15 percent of vehicle title borrowers do not have a checking account and thus may not be eligible for a payday loan.[108]

In the section 1022(b)(2) analysis the Bureau identified, but did not quantify, certain other potential impacts of the Mandatory Underwriting Provisions on consumers' access to credit. Consumers seeking to borrow more than $500 after the 2017 Final Rule's compliance

[105] *Id.* at 54835.

[106] *Id.* at 54840.

[107] *Id.*

[108] *Id.*

date may find their ability to do so limited because of the cap on the initial loan amount under the conditional exemption and because of the impact of the Rule on vehicle title loans, which tend to be for larger amounts.[109] Additionally, because of the principal step-down feature of the conditional exemption, consumers obtaining loans under that exemption would be forced to repay their loans more quickly than they do today. The Bureau believed that 40 percent of the reduction in payday revenue estimated to result from the Mandatory Underwriting Provisions would be the result of the cap on loan sizes under the conditional exemption and the remainder would be the result of the restriction on the number of loans available to consumers under that exemption coupled with the mandatory underwriting requirement for any additional loans.[110] Finally, the Bureau concluded, based on research concerning the implementation of various State regulations, that although the reduction in the number of storefronts would not substantially affect consumers' geographic access to payday locations in most areas, a small share of potential borrowers will lose easy access to stores.[111]

The Bureau, in the section 1022(b)(2) analysis, went on to observe that consumers who are unable to obtain a new loan because they cannot satisfy the Rule's mandatory underwriting requirement and have exhausted or cannot qualify for a loan under the conditional exemption will have reduced access to credit. They may be forced at least in the short term to forgo certain purchases, incur high costs from delayed payment of existing obligations, incur high costs and other negative impacts by simply defaulting on bills, or they may choose to borrow from sources

[109] *Id.* at 54841.

[110] *Id.*

[111] *Id.* at 54842 & n.1224. Research conducted by the Bureau had found that in one State where regulatory restrictions resulted in a substantial contraction of payday stores, the median distance between stores in counties outside of metropolitan areas increased from 0.2 miles to 13.9 miles. Supplemental Findings at 87.

that are more expensive or otherwise less desirable.[112] Some borrowers may overdraft their checking accounts; depending on the amount borrowed, an overdraft on a checking account may be more expensive than taking out a payday or single-payment vehicle title loan.[113] Similarly, "borrowing" by paying a bill late may lead to late fees or other negative consequences like the loss of utility service.[114] Other consumers may turn to friends or family when they would rather borrow from a lender.[115] The Bureau concluded, however, that to the extent the 2017 Final Rule's Mandatory Underwriting Provisions curbed extended borrowing sequences by consumers who did not expect such lengthy sequences, those provisions would have a positive effect on consumer welfare.[116]

III. Outreach

The Bureau has engaged in efforts to monitor and support industry implementation since the 2017 Final Rule was issued. As a part of those efforts, the Bureau has received input from a number of stakeholders regarding various aspects of the 2017 Final Rule. This input has included both concerns about lenders' ability to comply with the Rule and about the broader effects of various substantive provisions of the Rule on covered loans.

In developing this proposal, the Bureau has taken into account both the input it has received from stakeholders through its efforts to monitor and support industry implementation of the 2017 Final Rule as well as comments received in response to other Bureau initiatives,

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[112] *See* 82 FR 54472, 54841.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.* at 54846.

including the Bureau’s Call for Evidence series of RFIs issued in spring 2018. The issues that the Bureau has determined are appropriate to revisit are discussed in detail below.

Some of the concerns stakeholders have raised to the Bureau are outside of the scope of this proposal. For example, the Bureau received a rulemaking petition to exempt debit card payments from the Rule’s Payment Provisions. The Bureau has also received informal requests related to various aspects of the Payment Provisions or the Rule as a whole, including requests to exempt certain types of lenders or loan products from the Rule’s coverage and to delay the compliance date for the Payment Provisions. The Bureau intends to examine these issues and if the Bureau determines that further action is warranted, the Bureau will commence a separate rulemaking initiative (such as by issuing an RFI or an advance notice of proposed rulemaking).

Interagency Consultation. As discussed in connection with section 1022(b)(2) of the Dodd-Frank Act below, the Bureau’s outreach included consultation with other Federal consumer protection and prudential regulators. The Bureau has provided other regulators with information about the Bureau’s proposals, and received feedback that has assisted the Bureau in preparing this proposal.

Consultation with State and Local Officials. The Bureau’s outreach also included calls with State Attorneys General, State financial regulators, and organizations representing the officials charged with enforcing applicable Federal, State, and local laws on small-dollar loans.

Tribal Consultations. The Bureau has engaged in consultation with Indian tribes about this proposal. The Bureau held a consultation on December 19, 2018, at the Bureau's headquarters. All Federally-recognized Indian tribes were invited to this consultation, which generated frank and valuable input from Tribal leaders to Bureau senior leadership and staff about the effects such a proposal could have on Tribal nations and lenders.

In the meantime, the Bureau expects to release a small entity compliance guide to aid compliance with the Payment Provisions of the 2017 Final Rule. The guide will be published on the Bureau's regulatory implementation website for the Rule at https://www.consumerfinance.gov/policy-compliance/guidance/payday-lending-rule/.

IV. Legal Authority

Part IV of the **SUPPLEMENTARY INFORMATION** that accompanied the 2017 Final Rule discussed the legal authorities for the Rule.[117] Commenters may refer to that discussion for information about the legal background relating to the Rule. Each of the legal authorities that the Bureau relied upon in the 2017 Final Rule provides the Bureau with discretion to issue rules, and the Bureau preliminarily interprets these authorities to permit the Bureau to exercise that discretion to rescind a previously issued rule. This part IV summarizes the legal authorities that the Bureau views as most relevant to consideration of this proposal to rescind the Mandatory Underwriting Provisions.

The Bureau adopted the Mandatory Underwriting Provisions of the 2017 Final Rule in principal reliance on the Bureau's authority under section 1031(b) of the Dodd-Frank Act.[118] Section 1031(b) of the Dodd-Frank Act provides that the Bureau "may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." Section 1031(b) of the Dodd-Frank Act further provides that rules under section 1031 may include requirements for the purpose of preventing such acts or practices.

[117] 82 FR 54472, 54519-24.

[118] 12 U.S.C. 5531(b).

Section 1031(c)(1) of the Dodd-Frank Act provides that the Bureau shall have no authority under section 1031 to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that: the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and such substantial injury is not outweighed by countervailing benefits to consumers or to competition.[119] As the 2017 Final Rule explained, the unfairness provisions of the Dodd-Frank Act are similar to the unfairness provisions under the Federal Trade Commission Act (FTC Act), and the meaning of the Bureau's authority under section 1031(b) is informed by the FTC Act unfairness standard and FTC and other Federal agency rulemakings.[120] When applying section 1031(c) of the Dodd-Frank Act, the Bureau also considers the Federal Trade Commission's "Commission Statement of Policy on Scope of Consumer Unfairness Jurisdiction" (FTC Policy Statement), the principles of which Congress generally incorporated into section 5 of the FTC Act.[121]

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[119] 12 U.S.C. 5531(c)(1). Additionally, section 1031(c)(2) of the Dodd-Frank Act provides that in determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination. 12 U.S.C. 5531(c)(2).

[120] 82 FR 54472, 54520. *See also* 15 U.S.C. 41 *et seq*. Section 5(n) of the FTC Act, as amended in 1994, provides that the Federal Trade Commission (FTC) shall have no authority to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the FTC may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination. 15 U.S.C. 45(n).

[121] *See* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), *reprinted in In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070-88 (1984); *see also* S. Rep. No. 103-130, at 12-13 (1993) (legislative history to FTC Act amendments indicating congressional intent to codify the principles of the FTC Policy Statement).

Under section 1031(d) of the Dodd-Frank Act, the Bureau "shall have no authority . . . to declare an act or practice abusive in connection with the provision of a consumer financial product or service" unless the act or practice meets at least one of several enumerated conditions.[122] Section 1031(d)(2) of the Dodd-Frank Act provides, in pertinent part, that an act or practice is abusive when it takes unreasonable advantage of (1) a consumer's lack of understanding of the material risks, costs, or conditions of the product or service; or (2) a consumer's inability to protect the interests of the consumer in selecting or using a consumer financial product or service.

The Bureau's reasons for proposing to rescind its use of unfairness and abusiveness authority in the Mandatory Underwriting Provisions are discussed in parts V.B and V.C below.

In addition to section 1031 of the Dodd-Frank Act, the Bureau relied on other legal authorities for certain aspects of the Mandatory Underwriting Provisions of the 2017 Final Rule.[123] These include the conditional exemption for certain loans in § 1041.6; two provisions (§§ 1041.10 and 1041.11) that facilitate lenders' ability to obtain certain information about consumers' borrowing history from information systems that have registered with the Bureau; and certain recordkeeping requirements in § 1041.12.

In adopting each of these provisions, the Bureau relied on one or more of the following authorities. Section 1022(b)(3)(A) of the Dodd-Frank Act authorizes the Bureau, by rule, to conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products or services from any rule issued under Title X, which includes a rule

[122] 12 U.S.C. 5531(d).

[123] *See* 82 FR 54472, 54522.

issued under section 1031, as the Bureau determines is necessary or appropriate to carry out the purposes and objectives of Title X. In doing so, the Bureau must take into consideration the factors set forth in section 1022(b)(3)(B) of the Dodd-Frank Act.[124] Section 1022(b)(3)(B) specifies three factors that the Bureau shall, as appropriate, take into consideration in issuing such an exemption.[125] The Bureau also relied, in adopting certain provisions, on its authority under section 1022(b)(1) of the Dodd-Frank Act to prescribe rules as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws.[126] The term Federal consumer financial law includes rules prescribed under Title X of the Dodd-Frank Act, including those prescribed under section 1031.[127] Additionally, in the 2017 Final Rule, the Bureau relied, for certain provisions, on other authorities, including those in sections 1021(c)(3), 1022(c)(7), 1024(b)(7), and 1032 of the Dodd-Frank Act.[128]

The Bureau's decisions to use these authorities were premised on its decision to use its authority under section 1031 of the Dodd-Frank Act. If the Bureau decides to rescind its use of section 1031 authority in the Mandatory Underwriting Provisions, the Bureau preliminarily concludes that it should also rescind its uses of these other authorities in the Mandatory Underwriting Provisions. The specific provisions of the 2017 Final Rule that the Bureau is proposing to rescind are discussed further in the section-by-section analysis in part VI below.

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[124] 12 U.S.C. 5512(b)(3)(A).

[125] 12 U.S.C. 5512(b)(3)(B).

[126] 12 U.S.C. 5512(b)(1). The Bureau also interprets section 1022(b)(1) of the Dodd-Frank Act as authorizing it to rescind or amend a previously issued rule if it determines such rule is not necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, including a rule issued to identify and prevent unfair, deceptive, or abusive acts or practices.

[127] 12 U.S.C. 5481(14).

[128] 12 U.S.C. 5511(c)(3), 12 U.S.C. 5512(c)(7), 12 U.S.C. 5514(b)(7), and 12 U.S.C. 5522.

V. Explanation of the Bases for This Proposal to Rescind the Mandatory Underwriting Provisions of the 2017 Final Rule

This part explains the Bureau's reasons for proposing to rescind the use of its unfairness and abusiveness authority under section 1031 of the Dodd-Frank Act in the Mandatory Underwriting Provisions of the 2017 Final Rule. Part V.A reviews certain of the factual predicates and legal conclusions underlying this use of authority. Part V.B sets forth the Bureau's reasons for preliminarily concluding that the Bureau should require more robust and reliable evidence than it supplied in the 2017 Final Rule to support those factual predicates. Part V.C sets forth the Bureau's additional reasons for preliminarily determining that, under sections 1031(c) and (d) of the Dodd-Frank Act, the Bureau no longer identifies an unfair and abusive practice as set out in § 1041.4 of the 2017 Final Rule.[129] In part V.D, the Bureau discusses its consideration of alternatives. In part V.E, the Bureau concludes its analysis and requests comments.

Before addressing these factual and legal issues, the Bureau offers a few preliminary observations to place this rulemaking in its proper context.

Consumers living paycheck to paycheck and with little to no savings to fall back on face challenging financial lives. The Bureau's research has demonstrated that liquid savings and the

[129] The Bureau notes that, alongside covered short-term loans, the 2017 Final Rule included covered longer-term balloon-payment loans within the scope of the identified unfair and abusive practice. The Bureau stated that it was concerned that the market for covered longer-term balloon-payment loans, which is currently quite small, could expand dramatically if lenders were to circumvent the Mandatory Underwriting Provisions by making these loans without assessing borrowers' ability to repay. 82 FR 54472, 54583-84. The Bureau did not separately analyze the elements of unfairness and abusiveness for covered longer-term balloon-payment loans. *See id.* at 54583 n.626. Because the Bureau's identification in the Rule as to covered longer-term balloon-payment loans was predicated on its identification as to covered short-term loans, the Bureau preliminarily believes that if the latter is rescinded the former should also be rescinded.

ability to absorb a financial shock are closely tied to financial well-being.[130] A major focus of the Bureau's consumer education efforts has been, and continues to be, on encouraging savings among consumers. The Bureau also continues to conduct research to understand the efficacy of alternative methods of promoting savings[131] and, more generally, to better understand the specific events that can cause consumers to struggle to make ends meet and the choices consumers face in these circumstances.[132]

At the same time, the Bureau recognizes that a substantial number of households do not have the ability to withstand financial shocks without the use of credit or other alternatives, such as obtaining money from friends or relatives, cutting back on expenses, or pawning personal property. The Bureau is committed to ensuring that all consumers have access to consumer financial products and services and that the market for "liquidity loan products" is fair, transparent, and competitive.[133] For example, the Bureau continues to exercise supervisory and enforcement authority over lenders in this market and the Bureau has brought a number of enforcement actions in the past year against payday lenders that the Bureau determined were

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[130] Bureau of Consumer Fin. Prot., *Financial well-being in America,* at 48-49 (2017), https://files.consumerfinance.gov/f/documents/201709_cfpb_financial-well-being-in-America.pdf.

[131] The Bureau has published a study of a randomized control trial testing alternative means of encouraging consumers with a prepaid card to place some of their income into a savings vehicle. *See* Bureau of Consumer Fin. Prot., *Tools for saving: Using prepaid accounts to set aside funds* (2016), https://files.consumerfinance.gov/f/documents/092016_cfpb_ToolsForSavingPrepaidAccounts.pdf. The Bureau also is studying alternative means of encouraging savings of tax refunds in a research partnership with a major tax preparer.

[132] Bureau of Consumer Fin. Prot., *Making Ends Meet Survey*, https://www.consumerfinance.gov/data-research/making-ends-meet-survey/ ("Many households run out of money at one time or another and this survey is designed to help us understand consumer experiences and decisions when money gets tight. Since people's experiences can vary widely, please fill out the survey even if you have not borrowed or run out of money. The information you provide will help shape federal policies to ensure that everyone is treated fairly and respectfully when they borrow money to make ends meet.").

[133] *See* 12 U.S.C. 1021(a).

engaged in deceptive or other unlawful conduct.[134] The Bureau also continues to monitor this market for risks to consumers and to consider ways of assuring that consumers receive timely and understandable information to make responsible decisions regarding their use of these products.[135] Further, the Bureau has expressed its support for the efforts of other regulators to encourage depository institutions to offer credit products for consumers struggling to make ends meet,[136] and the Bureau's newly-created Office of Innovation plans to work with financial technology (fintech) firms seeking to enter the market for liquidity lending and enhance the competitiveness of the market.

The Mandatory Underwriting Provisions in the 2017 Final Rule, in contrast to the Bureau's efforts discussed above to increase credit access and competition in credit markets, would have the effect of restricting access to credit and reducing competition for these products. Moreover, the Mandatory Underwriting Provisions would impose requirements that would have the effect of reducing credit access and competition in the States which have determined it is in their citizens' interest to be able to use such products, subject to State-law limitations. For the reasons that follow, the Bureau preliminarily believes that neither the evidence cited nor legal reasons provided in the 2017 Final Rule support its determination that the identified practice is

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[134] *See, e.g., In the Matter of Cash Express, LLC,* Consent Order, CFPB No. 2018-BCFP-0007 (Oct. 24, 2018), https://files.consumerfinance.gov/f/documents/bcfp_cash-express-llc_consent-order_2018-10.pdf; Stipulated Final Judgment and Order, *CFPB v. Moseley,* Case No. 4:14-cv-00789-SRB (W.D. Mo. Aug. 10, 2018), https://files.consumerfinance.gov/f/documents/bcfp_hydra_stipulated-final-judgment-order_2018-08.pdf; *In the Matter of Triton Management Group, Inc., et al.*, Consent Order, CFPB No. 2018-BCFP-0005 (July 19, 2018), https://files.consumerfinance.gov/f/documents/bcfp_triton-management-group_consent-order_2018-07.pdf; *In the Matter of Enova Int'l, Inc.*, Consent Order, CFPB No. 2019-BCFP-0003 (Jan. 25, 2019), https://files.consumerfinance.gov/f/documents/cfpb_enova-international_consent-order_2019-01.pdf.

[135] *See* 12 U.S.C. 5512(c) and 5511(b)(1).

[136] *See* Press Release, Bureau of Consumer Fin. Prot., *Bureau Acting Director Mulvaney Statement on the OCC Short-Term, Small-Dollar Lending Announcement* (May 23, 2018), https://www.consumerfinance.gov/about-us/newsroom/bureau-acting-director-mulvaney-statement-occ-short-term-small-dollar-lending-announcement/.

unfair and abusive, thereby eliminating the basis for the 2017 Final Rule's Mandatory Underwriting Provisions to address that conduct.

The Bureau notes that, even if it were to finalize the proposed revocation of the Mandatory Underwriting Provisions, doing so would not preclude the agency in the future from imposing one or more alternatives to these provisions, provided that the Bureau has the necessary and appropriate factual and legal bases for doing so.

A. Overview of the Factual Predicates and Legal Conclusions Underlying the Mandatory Underwriting Provisions of the 2017 Final Rule

1. Unfairness

As noted above, section 1031(c)(1)(A) of the Dodd-Frank Act states that the Bureau has no authority to declare an act or practice to be unfair unless the Bureau has a reasonable basis to conclude that the act or practice causes or is likely to cause substantial injury which is not reasonably avoidable by consumers and that such substantial injury is not outweighed by countervailing benefits to consumers or to competition.[137]

In the 2017 Final Rule, the Bureau found that the practice of making covered short-term or longer-term balloon-payment loans to consumers without determining if the consumers have the ability to repay causes or is likely to cause substantial injury to consumers. The Bureau reasoned that where lenders were engaged in this identified practice and the consumer in fact lacks the ability to repay, the consumer will face choices—default, delinquency, and reborrowing, as well as the negative collateral consequences of being forced to forgo major

[137] 12 U.S.C. 5531(c)(1).

financial obligations or basic living expenses to cover the unaffordable loan payment—each of which the Bureau found in the 2017 Final Rule leads to injury for many of these consumers.[138]

The Bureau went on to address the issue of whether the substantial injury that the Bureau had found was reasonably avoidable by consumers. The Bureau stated that under section 1031(c)(1)(A) of the Dodd-Frank Act for an injury to be reasonably avoidable consumers must "have reasons generally to anticipate the likelihood and severity of the injury and the practical means to avoid it."[139] The Bureau added: "[t]he heart of the matter here is consumer perception of risk, and whether borrowers are in [a] position to gauge the likelihood and severity of the risks they incur by taking out covered short-term loans in the absence of any reasonable assessment of their ability to repay those loans according to their terms."[140]

In applying this standard, the 2017 Final Rule focused on borrowers' ability to predict their individual outcomes prior to taking out loans. The Bureau acknowledged that "is possible that many borrowers accurately anticipate their debt duration."[141] However, the Bureau stated that its "primary concern is for those longer-term borrowers who find themselves in extended loan sequences" and that for those borrowers "the picture is quite different, and their ability to estimate accurately what will happen to them when they take out a payday loan is quite limited."[142] That led the Bureau to conclude that "many consumers do not understand or

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[138] 82 FR 54472, 54590-94.

[139] *Id.* at 54594.

[140] *Id.* at 54597.

[141] *Id.*

[142] *Id.*

perceive the probability that certain harms will occur"[143] and that therefore it would not be reasonable to expect consumers to take steps to avoid injury.[144]

The Bureau based that finding in the 2017 Final Rule primarily on its interpretation of limited data from a study by Professor Ronald Mann (Mann Study), which compared consumers' predictions when taking out a payday loan about how long they would be in debt with administrative data from lenders showing the actual time consumers were in debt.[145] The Bureau stated that its interpretation of the limited data from this study "provides the most relevant data describing borrowers' expected durations of indebtedness with payday loan products."[146] The Mann Study is discussed further in part V.B.1 below.[147]

In further support of the finding in the 2017 Final Rule that some consumers were not in a position to evaluate the likelihood and severity of these risks and therefore it would not be reasonable to expect consumers to take steps to avoid the injury, the Bureau in the 2017 Final Rule relied on other findings, including those related to the marketing and servicing practices of providers of short-term loans,[148] and on the Bureau's own expertise and experience in supervisory matters and enforcement actions concerning covered lenders in the markets for

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[143] *Id.*

[144] *Id.* at 54594.

[145] Ronald Mann, *Assessing the Optimism of Payday Loan Borrowers*, 21 Supreme Court Econ. Rev. 105 (2013), *discussed at* 82 FR 54472, 54568-70, 54592, 54597; *see also id.* at 54816-17, 54836-37 (section 1022(b)(2) analysis discussion of the Mann Study).

[146] 82 FR 54472, 54816.

[147] The Bureau also referenced two academic studies, one of which compared borrowers' belief about the average borrower with data about the average outcome of borrowers and the other of which compared borrowers' predictions of their own borrowing with average outcomes of borrowers in another State. These studies found that borrowers appear, on average, somewhat optimistic about the length of their indebtedness. *See* 82 FR 54472, 54568, 54836. However, the Bureau noted the weaknesses of these studies, *id.* at 54568, and, as discussed, relied primarily on the Mann Study.

[148] *See, e.g.*, *id.* at 54616.

covered short-term and longer-term balloon-payment loans.[149] These additional factors are discussed in detail in part V.B.2 below.

2. Abusiveness

Section 1031(d)(2) of the Dodd-Frank Act states in pertinent part that the Bureau shall have no authority to declare an act or practice abusive unless the act or practice "takes unreasonable advantage" of either (A) "a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service"; or (B) "the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service."[150] The Bureau, in imposing the Mandatory Underwriting Provisions of the 2017 Final Rule, relied on both of these prongs of the abusiveness definition.

With respect to the "lack of understanding" prong set forth in section 1031(d)(2)(A) of the Dodd-Frank Act, the Bureau acknowledged in the 2017 Final Rule that consumers who take out covered short-term or longer-term balloon-payment loans "typically understand that they are incurring a debt which must be repaid within a prescribed period of time and that if they are unable to do so they will either have to make other arrangements or suffer adverse consequences."[151] However, in the 2017 Final Rule the Bureau interpreted "understanding" to require more than a general awareness of possible negative outcomes. Rather, the Bureau stated that consumers lack the requisite level of understanding if they do not understand both their own individual "likelihood of being exposed to the risks" of the product or service in question and

[149] *Id.* at 54505-07.

[150] 12 U.S.C. 5531(d)(2)(A), (B). Section 1031(d)(1) and (d)(2)(C) of the Dodd-Frank Act provide alternative grounds on which a practice may be deemed to be abusive but the Bureau did not rely on either of those grounds for the Mandatory Underwriting Provisions of the 2017 Final Rule.

[151] 82 FR 54472, 54615 (summarizing the Bureau's rationale for the 2016 Proposal).

"the severity of the kinds of costs and harms that may occur."[152] The Bureau in the 2017 Final Rule found that "a substantial portion of borrowers, and especially those who end up in extended loan sequences, are not able to predict accurately how likely they are to reborrow."[153] This finding also was based primarily on the Bureau's interpretation of limited data from the Mann Study and is discussed further below.[154]

With respect to the alternative "inability to protect" prong of abusiveness set forth in section 1031(d)(2)(B) of the Dodd-Frank Act, the Bureau began by finding in the 2017 Final Rule that consumers who lack an understanding of the material costs and risks of a product often will be unable to protect their interests.[155] The Bureau's analysis found that consumers who use short-term loans "are financially vulnerable and have very limited access to other sources of credit" and that they have an "urgent need for funds, lack of awareness or availability of better alternatives, and no time to shop for such alternatives."[156] The Bureau also found in the 2017 Final Rule that consumers who take out an initial loan without the lender's reasonably assessing the borrower's ability to repay were generally unable to protect their interests in selecting or using further loans.[157] According to the Bureau, consumers who obtain loans without an ability-to-pay determination and who in fact lack the ability to repay may have to choose between competing injuries—default, delinquency, reborrowing, and default avoidance costs, including

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[152] *Id.* at 54617.

[153] *Id.* at 54615.

[154] *See id.*

[155] *Id.* at 54618.

[156] *Id.* at 54618-20.

[157] *Id.* at 54619.

forgoing essential living expenses.[158] The Bureau concluded that, "though borrowers of covered loans are not irrational and may generally understand their basic terms, these facts do[] not put borrowers in a position to protect their interests."[159]

In support of the conclusion that consumers with payday loans could not protect their own interests, the Bureau relied in the 2017 Final Rule primarily on a survey of payday borrowers conducted by the Pew Charitable Trusts (Pew Study).[160] In the Pew Study, 37 percent of borrowers reported that at some point in their lives they had been in such financial distress that they would have taken a payday loan on "any terms offered."[161] The Bureau viewed this study as showing that borrowers of short-term loans "may determine that a covered loan is the only option they have."[162] The Pew Study is discussed further below in part V.B.3.

After determining that consumers lack understanding of the material risks, costs, or conditions of covered short-term and longer-term balloon-payment loans and that consumers are unable to protect their interests in selecting or using such products, the Bureau went on to conclude in the 2017 Final Rule that by making such loans to consumers without first assessing the consumers' ability to repay, lenders took unreasonable advantage of these consumer vulnerabilities. In reaching this conclusion, the Bureau acknowledged that section 1031(d) of the Dodd-Frank Act "does not prohibit financial institutions from taking advantage of their superior knowledge or bargaining power" and that "in a market economy, market participants with such

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[158] *Id.*

[159] *Id.* at 54620.

[160] Pew Charitable Trusts, *How Borrowers Choose and Repay Payday Loans* (2013), http://www.pewtrusts.org/~/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-(1).pdf.

[161] *See id.*, citing the Pew Study at 20; *see also* 82 FR 54472, 54618-19 (further discussing the Pew Study).

[162] 82 FR 54472, 54619.

advantages generally pursue their self-interests."[163] The Bureau reasoned, however, that section 1031(d) of the Dodd-Frank Act "makes plain that there comes a point at which a financial institution's conduct in leveraging its superior information or bargaining power becomes unreasonable advantage-taking" and the Bureau understood the statute to delegate to the Bureau "the responsibility for determining when that line has been crossed."[164] The Bureau in the 2017 Final Rule did not identify any specific threshold but nonetheless found that "many lenders who make such loans have crossed the threshold."[165]

In support of its conclusion that lenders take unreasonable advantage of consumers of covered short-term and longer-term balloon-payment loans, the Bureau in the 2017 Final Rule pointed to a range of lender practices including the design of the loan products, the way they are marketed, the absence of underwriting, the limited repayment options and the way those are presented to consumers, and the collection tactics used when consumers fail to repay.[166] The Bureau stated that "the ways lenders have structured their lending practices here fall well within any reasonable definition" of what it means to take unreasonable advantage under section 1031(d) of the Dodd-Frank Act.[167] The Bureau then singled out specifically the failure to underwrite and concluded that lenders take unreasonable advantage in circumstances if they make covered short-term loans or covered longer-term balloon-payment loans without reasonably assessing the consumer's ability to repay the loan according to its terms.[168]

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[163] *Id.* at 54621.

[164] *Id.*

[165] *Id.* at 54622.

[166] *Id.* at 54622-23.

[167] *Id.* at 54623.

[168] *Id.*

B. Reconsidering the Evidence for the Factual Findings in Light of the Impacts of the Mandatory Underwriting Provisions

In questioning here whether the evidence is sufficient for the Bureau's factual findings necessary to support the determinations that the identified practice was unfair and abusive and thereby warrants the imposition of the Mandatory Underwriting Provisions of the 2017 Final Rule, the Bureau is not addressing whether the evidence supporting the factual findings in the 2017 Final Rule would be sufficient to withstand judicial review under the Administrative Procedure Act (APA).[169] Here, even if the evidence is sufficient for the factual findings necessary to support the Bureau's unfairness and abusiveness determinations on which the Mandatory Underwriting Provisions are based, the Bureau believes it is prudent as a policy matter to require a more robust and reliable evidentiary basis to support key findings in a rule that would eliminate most covered short-term and longer-term balloon-payment loans and providers from the marketplace, thus restricting consumer access to these products.

As explained in part II.C, in the regulatory impact analyses accompanying the 2017 Final Rule, the Bureau estimated that the Mandatory Underwriting Provisions would have dramatic effects on the market for payday and single-payment vehicle title loans and on consumers who use those products. The Bureau estimated that the Mandatory Underwriting Provisions would result in a large (55 to 62 percent) contraction of the storefront payday industry—an industry that includes over 2,400 small businesses—and the virtually complete elimination of the single-payment vehicle title industry—an industry that includes over 800 small businesses.[170] The

[169] 5 U.S.C. 500 *et seq.*

[170] 82 FR 54472, 54479, 54492.

Bureau further estimated in the 2017 Final Rule that, of the current set of payday borrowers, 6 percent would not be able to initiate a payday loan sequence to meet a borrowing need and that 15 percent or more of vehicle title borrowers would not be able to obtain short-term loans.[171] The Bureau further acknowledged that additional borrowers who could obtain loans might nevertheless be unable to borrow the amount of money they needed, and that many borrowers would likely be required to repay their loans more quickly than prior to the Rule—a requirement that could create financial hardship for such consumers.[172] In short, the Mandatory Underwriting Provisions of the Rule would impose substantial burdens on industry, significantly constrain lenders' offering of products, and substantially restrict consumer choice and access to credit. All this would occur notwithstanding the judgments that the various States have made to permit lenders to offer and consumers to choose such products subject to certain limitations.

The Bureau preliminarily believes that the dramatic effects on consumers' ability to choose credit and on lenders' ability to offer them such credit that would follow from prohibiting the identified practice has significant implications for how the Bureau ought to assess the evidentiary support for the predicate factual findings. For purposes of this rulemaking proposal, the Bureau need not reconsider that the 2017 Final Rule found that the identified practice causes or is likely to cause substantial injury. However, the Bureau is concerned about whether the evidence in this instance provides a "reasonable basis" to find that (1) the identified injury "is not reasonably avoidable by consumers" for purposes of an unfairness analysis; (2) that there is

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[171] *Id.* at 54609. Specifically, the Bureau noted in the 2017 Final Rule that two States that permit vehicle title lending do not permit payday lending. In addition, 15 percent of vehicle title borrowers do not have a checking account, and thus may not be eligible for a payday loan. *Id.* at 54840.

[172] *Id.* at 54840-41.

either a "lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service" or an "inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service" for purposes of an abusiveness analysis.[173] The FTC Policy Statement explained that reasonable avoidability for purposes of unfairness analysis is premised on the fact that "[n]ormally we expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market."[174]

If a rule could have such dramatic impacts on consumer choice and access to credit, the Bureau preliminarily believes that it would be reasonable under the Dodd-Frank Act and prudent to have robust and reliable evidence to support the key finding that consumers cannot reasonably avoid that injury. Similarly, the Bureau preliminarily believes that it would be reasonable under the Dodd-Frank Act and prudent to have robust and reliable evidence to support key findings of about "lack of understanding" and an "inability to protect" as needed to establish abusiveness.

Accordingly, the Bureau preliminarily concludes that it should have a robust and reliable evidentiary basis for key findings with respect to "reasonable avoidability," "lack of understanding," and "inability to protect" that are essential to the Mandatory Underwriting Provisions in the 2017 Final Rule. For the reasons discussed below, the Bureau preliminarily believes that the evidence on which the Mandatory Underwriting Provisions of the 2017 Final Rule rests is not sufficiently robust and reliable to support such findings regardless of whether it

[173] 12 U.S.C. 5531(c), (d).

[174] *See* FTC Policy Statement, *Int'l Harvester*, 104 F.T.C. 949, 1074.

would be sufficient to withstand judicial review under the APA, and that rescission of the Mandatory Underwriting Provisions is therefore appropriate.

1. The Mann Study and the Findings Based on It

As discussed in part V.A.1, in determining that the identified practice is unfair, in the 2017 Final Rule the Bureau concluded, as required by section 1031(c)(1)(A) of the Dodd-Frank Act, that the practice causes or is likely to cause substantial injury to consumers and that this injury is not reasonably avoidable by consumers.[175] That latter determination rested on the Bureau's finding that many consumers do not have a specific understanding of their personal risks and cannot accurately predict how long they will be in debt after taking out covered short-term or longer-term balloon-payment loans.[176] That finding was based primarily on the Bureau's interpretation of limited data from the Mann Study, which the Bureau described in the 2017 Final Rule as providing the most relevant data describing borrowers' expected durations of indebtedness with payday loan products.[177]

Similarly, as discussed in part V.A.2, in determining that the practice of making covered short-term or longer-term balloon-payment loans without assessing consumers' ability to repay is abusive under section 1031(d)(2)(A) of the Dodd-Frank Act, the Bureau found in the 2017 Final Rule that many consumers do not understand the material risks, cost, or conditions of such loans, because they do not have a specific understanding of their individualized risk and cannot

[175] 82 FR 54472, 54596.

[176] *Id.* at 54597.

[177] *Id.* at 54816.

accurately predict how long they will be in debt after taking out these loans.[178] That finding, too, was based primarily on the Bureau's interpretation of limited data from the Mann Study.[179]

In the Mann Study, a set of consumers, when applying for a loan, completed a survey that asked for their expectations as to the length of time they would be in debt after taking out the loan. Professor Mann compared those answers to administrative data from lenders showing the total length of time it took for the borrower to pay off the loan and not reborrow from the same lender for a full pay period.[180] Based on his analysis of the data, Professor Mann concluded that most borrowers anticipate that they will not be free of debt at the end of the initial loan term and instead will need to reborrow.[181] He also concluded that borrowers' estimates of an ultimate repayment date "are realistic."[182] Professor Mann further concluded that this evidence indicates that most borrowers "have a good understanding of their own use of the product."[183]

In the 2017 Final Rule, the Bureau acknowledged Professor Mann's quantitative findings but "dispute[d] his interpretation of those findings."[184] Professor Mann provided the Bureau with certain charts and graphs from his study, including scatterplots of borrowers' reborrowing

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[178] *Id.* at 54597.

[179] *Id.*

[180] *See* Mann Study at 117.

[181] *Id.* at 128.

[182] *Id.* at 109.

[183] *Id.*

[184] 82 FR 54472, 54836. The Bureau specifically relied on a scatterplot provided by Professor Mann depicting his respondents' predicted durations of indebtedness vs. the time they actually spent in debt, and the corresponding regression line. Professor Mann also provided the Bureau with other data, including histograms of his respondents' days to clearance, prediction errors, borrowing experience, etc. However, the Bureau did not have access to the complete data from Professor Mann's study, including individual-level survey responses that would allow the data provided in the figures to be linked to the other information collected in the Mann Study.

expectations and outcomes.[185] The Bureau analyzed these materials and concluded based on them that borrowers who experienced very long reborrowing sequences do not anticipate these outcomes and that, in general, borrowers' predictions of their outcomes were uncorrelated with their outcomes.[186] The Bureau noted, for example, that based on the limited materials it received from Professor Mann, none of the borrowers who experienced sequences of longer than 140 days (10 biweekly loans) predicted that outcome, and that none of the borrowers who predicted such an outcome actually experienced it.[187] The Bureau further stated in the 2017 Final Rule that its analysis of these limited materials found no correlation between individual consumers' predictions of their outcomes and their actual outcomes.[188]

The Bureau initially offered its interpretation of limited data from the Mann Study in its 2016 Proposal.[189] In response, Professor Mann submitted a comment taking issue with the Bureau's analysis. In his comment, Professor Mann observed that the Bureau had made "substantial use" of his study but described the Bureau's use of the work as "inaccurate and misleading," and deemed the Bureau's summary of his work "unrecognizable."[190] In issuing the Rule, the Bureau discussed Professor Mann's comment and concluded that his objections "reflect more of a difference in emphasis than a disagreement over the facts."[191]

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[185] *See* 82 FR 54472, 54836 nn.1190-91.

[186] *Id.* at 54836-37; *see also id.* at 54569.

[187] *Id.* at 54569.

[188] *Id.* at 54570.

[189] *See* 81 FR 47864, 47928-29.

[190] Comment submitted by Ronald Mann, Docket No. CFPB-2016-0025-141822, at 1.

[191] 82 FR 54472, 54569.

Upon further consideration, there are clear limitations to the Mann Study which the Bureau now believes undermine the reliability and probative value of the Bureau's interpretation of the limited data it received from Professor Mann as the main basis for the Bureau to make findings concerning consumer awareness of potential outcomes from taking out payday loans from payday lenders throughout the United States. The Mann Study involved a single payday lender in just five States and was administered at a limited number of locations.[192] A study focusing on a single lender or limited number of lenders may not necessarily be representative of the variety of payday lenders across the United States. In addition, these five States also are not necessarily representative of payday lending nationally.[193] Thus, the Mann Study's findings and the Bureau's interpretation of limited data from that study are most informative about what prospective customers of this single lender at these locations in these States understood about how long they would need to borrow. While the Mann Study may provide useful insights as to these potential customers, consumers using other lenders or in other places might or might not have the same understanding as those in the Mann Study. Because consumer understandings and expectations may be informed by the information consumers are provided—and because that information can vary from lender to lender and State to State[194]—the Bureau preliminarily concludes the Mann Study and the Bureau's interpretation of limited data from that study are not a sufficiently robust and representative basis to make general findings about all lenders making

[192] *See* Mann Study at 116.

[193] The Mann Study noted that rollover loans are technically prohibited in all five of the States in which payday borrowers were surveyed. Mann Study at 114. Further, same-day rollover transactions are not possible in Florida, which has a 24-hour cooling-off period, and are limited in Louisiana, which permitted rollovers only upon partial payment of the principal. *Id*. Over half of the survey participants were in Florida and Louisiana alone. *Id.* at 117 & tbl. 1.

[194] 82 FR 54472, 54486 (identifying detailed disclosures required of payday lenders under Texas law), and *id.* at 54577 (noting that some jurisdictions require lenders to provide specific disclosures in order to alert borrowers of potential risks).

payday loans to all borrowers in all States, let alone to generalize about borrowers using short-term vehicle title loans or other types of covered short-term or longer-term balloon-payment loans, which the Mann Study and the Bureau's interpretation of limited data from that study did not even address.

For all of these reasons, the Bureau is now reconsidering its decision to rely so heavily on its interpretation of limited data from a study with such a narrow focus as the basis for a rule with effects of the magnitude of those estimated to arise from the Mandatory Underwriting Provisions of the 2017 Final Rule. In this case, more research asking consumers about their *ex ante* understanding of their own, or others', expected outcomes, and possibly various measures of these distributions, would increase the evidentiary base. Without additional research involving more lenders and more locations, it is difficult to be confident that the conclusions that the Bureau drew in the 2017 Final Rule from its interpretations of the limited data from the Mann Study can be applied generally to payday lenders and payday loans across the United States. Consequently, the Bureau preliminarily believes that, especially given the dramatic market impacts of the 2017 Final Rule's Mandatory Underwriting Provisions on the future ability of consumers who want to do so to choose these products, the Mann Study's findings and the Bureau's interpretation of limited data from that study were not adequately robust and representative to serve as the primary basis of the Bureau's findings. Additionally, the Bureau notes that in two industry-sponsored surveys conducted of consumers who had successfully paid off a payday loan, the overwhelming majority of respondents reported that when they took out their first loan they understood well or quite well how long it would take to "completely repay the loan" and that they were able to repay their loan in the amount of time expected.[195]

Finally, the Bureau notes that, in two academic papers based upon surveys of payday borrowers, only a small portion—around 11 or 12 percent of borrowers—reported that they were somewhat or very dissatisfied with their most recent payday loan experience.[196] While the Bureau notes there are concerns about the representativeness of the samples surveyed, if it took consumers longer to pay off payday loans than they thought it would, one might expect consumers to be dissatisfied with their payday loans. They were not. These results thus add to the Bureau's preliminary conclusion that its interpretation in the 2017 Final Rule of limited data from the Mann Study provides an insufficiently robust and representative foundation for the findings on which the Bureau relied in concluding that its identified practice was unfair and abusive.

For all these reasons and as discussed further below, the Bureau preliminarily believes the limited data from the Mann Study was not sufficiently robust and representative, in light of the Rule's dramatic impacts in restricting consumer access to payday loans, to be the linchpin for a series of key findings, including that (1) consumers who use covered short-term or longer-term balloon-payment loans lack the understanding needed to reasonably avoid injury from lenders'

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[195] *See id.* at 54570 (discussing studies). The 2017 Final Rule noted a number of limitations in these studies, including a sampling bias resulting from surveying only successful repayers and the fact that these were *ex post* surveys asking about expectations at an earlier point in time. *Id.* Despite these limitations, these studies tend to corroborate concerns about the robustness and representativeness of the Bureau's key findings based on its interpretation of limited data from the Mann Study.

[196] *See* Gregory Elliehausen & Edward Lawrence, *Payday Advance Credit in America: An Analysis of Customer Demand*, at 52 (2001), http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=F5246C700D90651E3340EF590C686B41?doi=10.1.1.200.7740&rep=rep1&type=pdf; Gregory Elliehausen, *An Analysis of Consumers' Use of Payday Loans*, at 41 (2009), https://www.researchgate.net/publication/237554300_AN_ANALYSIS_OF_CONSUMERS'_USE_OF_PAYDAY_LOANS; *see also* Christy A. Bronson & Daniel J. Smith, *Swindled or Served?: A Survey of Payday Lending Customers in Southeast Alabama*, 40 S. Bus. & Econ J. 16 (2016) (finding general satisfaction with payday lending in non-random survey of 48 people in Southeast Alabama).

failure to assess consumers' ability to repay those loans; (2) consumers lack understanding of the material risks, costs, or conditions of such loans; and (3) consumers' lack of understanding contributes to their inability to protect their interests in the selection or use of such loans. The Bureau also preliminarily believes that it cannot, in a timely and cost-effective manner for itself and for lenders and borrowers, develop evidence that might or might not corroborate the Mann Study results that the Bureau relied upon to support the key findings the Bureau set forth in the 2017 Final Rule.[197] The Bureau invites comment on the robustness and representativeness of the evidence supporting these findings, including comment on the weight the Bureau placed on its interpretation of limited data from the Mann Study and on any other evidence that may bear on these findings.

2. Other Evidence on the Consumer Understanding of Risk

The Bureau, in the 2017 Final Rule, pointed to other evidence and made a number of additional factual findings in support of its key finding, also principally based on the Mann Study, that consumers were not able to predict accurately the specific likelihood of their individual risk of entering a long reborrowing sequence from taking out a covered short-term or longer-term balloon-payment loan.

For instance, the Bureau stated in the 2017 Final Rule that the way in which covered short-term and longer-term balloon-payment loans are structured and marketed, in addition to lenders' practices in encouraging consumers to reborrow, are factors that exacerbate and contribute to consumer confusion and lack of understanding as to whether they will end up in

[197] As the Bureau noted in the 2017 Final Rule, "[m]easuring consumers' expectations about re-borrowing is inherently challenging." 82 FR 54472, 54568.

long reborrowing sequences.[198] Further, the Bureau relied on its expertise and experience in supervisory matters and enforcement actions concerning covered lenders in making judgments about the covered short-term and longer-term balloon-payment loan markets.[199] That is, the Bureau determined on the basis of its expertise and experience that the available data—primarily its interpretation of limited data from the Mann Study—corroborated its belief that "a large number of consumers do not understand even generally the likelihood and severity of [the] risks" associated with taking out a short-term loan.[200]

These additional findings,[201] in essence, supplemented and were ultimately subordinate to the Bureau's interpretation of limited data from the Mann Study, which was the linchpin for the

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[198] *See, e.g.*, *id.* at 54555; *see also id.* at 54561 (explaining that "[v]arious lender practices exacerbate the problem by marketing to borrowers who are particularly likely to wind up in long sequences of loans, by failing to screen out borrowers who are likely to wind up in long-term debt or to establish guardrails to avoid long-term indebtedness, and by actively encouraging borrowers to continue to reborrow when their single-payment loans come due."). The Bureau, in the 2017 Final Rule, pointed to a host of lender practices before, during, and after origination that the Bureau said tend to diminish consumers' ability to avoid or mitigate harms and protect their own interests in selecting or using covered products. *Id.* at 54560-61. These included marketing that portrays the product as a short-term financial fix rather than emphasizing the substantial risks of reborrowing, screening only for immediate default risk at origination rather than conducting more vigorous underwriting, various practices in connection with taking account access and vehicle title, the presentation of repayment options as *only* allowing for full repayment or rollovers, and failing to inform consumers of "off-ramp" payment options. *Id.* at 54561-65.

[199] *See id.* at 54506-07.

[200] *Id.* at 54597-98. The Bureau also interpreted one survey of payday borrowers, about how long the average borrower would have a payday loan outstanding, to suggest that borrowers were "somewhat optimistic" about reborrowing behavior generally. *See id.* at 54568 & n.542 (citing Marianne Bertrand & Adair Morse, *Information Disclosures, Cognitive Biases and Payday Borrowing*, 66 J. of Fin. 1865 (2011)). The survey asked the question: "What's your best guess of how long it takes the average person to pay back in full a $300 payday loan?" (quoted at 82 FR 54568). However, the Bureau did not address the overall findings from the survey that, though responses varied widely, the mean response to the survey was "close to [the] range" of other data indicating how long borrowers actually took to pay back their loans. *See* Bertrand & Morse at 1878.

[201] The Bureau in the 2017 Final Rule cited research stating that certain consumer behaviors may make it difficult for them to predict accurately the future implications of taking out a covered short-term or longer-term balloon-payment loan. As the Bureau made clear, however, this research helped to explain the Bureau's findings from the Mann Study but was not in itself an independent basis to conclude that consumers do not predict whether they will remain in reborrowing sequences. 82 FR 54472, 54571 (explaining that "[r]egardless of the underlying explanation, the empirical evidence indicates that many borrowers who find themselves ending up in extended loan sequences did not expect that outcome."). Other data cited in the 2017 Final Rule to support consumers' underestimation of the cost and timing of repaying payday loans appears to be cited out of context. *See, e.g.*, *id.* at 54571 (citing Rob Levy & Joshua Sledge, *A Complex Portrait: An Examination of Small-Dollar Credit Consumers*, (Ctr. for Fin. Serv.

Bureau's findings in the 2017 Final Rule that consumers lacked an understanding of the possible risks and consequences associated with taking out payday loans. The Bureau does not believe that this additional evidence and other findings suffice to compensate for the insufficient robustness and representativeness of the limited data from the Mann Study.

3. The Pew Study and the Finding Based on It

As discussed in part V.A.2 above, the Bureau in the 2017 Final Rule also found that consumers who use covered short-term or longer-term balloon-payment loans lack the ability to protect their interests in selecting or using these loans, and that lenders' practice of making such loans without assessing consumers' ability to repay took unreasonable advantage of that vulnerability.[202] The predicate finding that these consumers lack the ability to protect themselves relied heavily on a survey of payday borrowers conducted by the Pew Charitable Trusts, discussed above, in which 37 percent of borrowers answered in the affirmative to the question "Have you ever felt you were in such a difficult situation that you would take [a payday loan] on pretty much any terms offered?"[203] The Bureau interpreted the survey results as demonstrating that these consumers, if faced with an immediate need for cash, lack the ability to "effectively identify or develop alternatives that would vitiate the need to borrow [or] allow them to borrow on terms within their ability to repay."[204]

Innovation, 2012), https://www.fdic.gov/news/conferences/consumersymposium/2012/A%20Complex%20Portrait.pdf). The Bureau suggested that users of payday and vehicle title loan products were more likely to underestimate the cost of their loans compared to users of other credit products. On further review, the Bureau does not believe that this statement presents a complete picture, because the cited study asked for predictions on cost and timing regarding small dollar loan products only, not more common credit products like credit cards. *See* 82 FR 54472, 54571; Levy & Sledge at 21. The Bureau also did not address the study's findings identifying many users of payday and title loan products who found the loans less costly than expected, and found themselves in debt for less time than expected. *See* Levy & Sledge at 21.

[202] 82 FR 54472, 54614.

[203] Pew Study at 6, 21, 60.

[204] 82 FR 54472, 54619.

The Bureau preliminarily believes that the Pew Study is an inadequate basis for the Bureau in the 2017 Final Rule to have drawn broad conclusions about consumers' ability to take actions to protect their own interests. To begin with, the survey asked respondents about their feelings, not about their actions. Respondents were not asked whether they had, in fact, taken out a payday loan at a time when they said they would have done so on "pretty much any terms." That some respondents at some time felt they had been at some point willing to take a payday loan on any terms does not indicate what they actually did at that time or how often they took out payday loans in general. Further, the Pew Study itself contains a number of other findings that cast doubt on whether, as the Bureau found, payday borrowers cannot explore available alternatives that would protect their interests. For example, the Pew Study found that 58 percent of respondents had trouble meeting their regular monthly bills half the time or more, suggesting that these borrowers are, in fact, accustomed to exploring alternatives to deal with cash shortfalls.[205] Similarly, in a prior survey, the Pew Charitable Trusts found that if payday loans were not available, borrowers would cut back on expenses (81 percent), delay paying some bills (62 percent), borrow from friends or family (57 percent), or pawn personal property (57 percent)[206]—further raising questions with respect to the Bureau's reliance in the 2017 Final Rule on the Pew Study to find that consumers cannot explore other alternatives and thus cannot protect their interests. These results indicate that consumers are familiar with mechanisms other than payday loans to deal with cash shortfalls.

Other research casts further doubt on the weight the Bureau placed in the 2017 Final Rule on the Pew Study and on the robustness and reliability of the evidence to support the Bureau's

[205] Pew Study at 9.

[206] Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why*, at 16 (2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.

finding that consumers who use payday or other covered short-term or longer-term balloon-payment loans lack the ability to explore alternatives. One study suggests that, precisely because they are financially vulnerable, payday borrowers are accustomed to facing cash shortfalls and have used a variety of different approaches for dealing with such situations. Some involve juggling of expenses, while others involve accessing alternative sources of cash, including overdraft, pawn loans, and informal borrowing. Research released since the 2017 Final Rule underscores the point. In a recent report issued by the Board regarding the economic well-being of U.S. households, consumers who reported that they would have difficulty covering a $400 emergency expense were asked how they would cope were such an emergency to arise. These consumers pointed to a variety of potential mechanisms including borrowing from a friend or family member (26 percent) or selling something (19 percent). Only 5 percent reported that they would use a payday loan or similar product.[207] Although it is possible that those who said they would use a payday loan are systematically different from other respondents and do not have other options available to them, this Board report at least raises significant questions as to whether that is so.

The Bureau also suggested in the 2017 Final Rule that consumers who take out a covered short-term or longer-term balloon-payment loan may do so because of the "lack of … availability of better alternatives."[208] Here, too, the Pew Study is inconclusive. It found that many borrowers repaid their loans using methods they could have used instead of taking out a payday

[207] Bd. of Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S. Households in 2017*, at 21 (2018), https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf.

[208] 82 FR 54472, 54620.

loan in the first instance, suggesting that these borrowers may have had other alternatives at the time they took out the loan.[209] Other recent research has emphasized the extent to which borrowing among friends and families is common among the most financially vulnerable.[210] Moreover, in the 2017 Final Rule, the Bureau itself reviewed a range of options that it believed would be available and accessible to consumers if they were unable to obtain a covered short-term or longer-term balloon-payment loan as a result of the ability-to-repay determination required by the Rule.[211] These include installment loans offered by payday and vehicle title lenders and other providers which are replacing short-term products,[212] as well as emerging fintech products such as wage advances and no-cost advances.

Finally, the Bureau notes that in 17 States and the District of Columbia, payday loans are prohibited. Consumers in these States that find themselves in difficult financial circumstances rely primarily on options other than covered short-term and longer-term balloon-payment loans,[213] raising questions about the Bureau's finding that consumers in States in which payday loans are not prohibited cannot do so.

For all the reasons set forth above, the Bureau preliminarily believes that the Pew Study does not provide a sufficiently robust and reliable basis for the Bureau's finding in the 2017 Final Rule that consumers who use covered short-term or longer-term balloon-payment loans

[209] Alternatives to borrowing identified by the Pew Study included receiving funds from family and friends, using tax refunds, pawning or selling items, using credit cards, and taking out a loan from a bank or credit union. Pew Study at 36-38.

[210] *See, e.g.,* Jonathan Morduch and Julie Siwicki, *In and Out of Poverty: Episodic poverty and income volatility in the U.S. Financial Diaries*, at 17 (2017), https://www.usfinancialdiaries.org/paper2.

[211] 82 FR 54472, 54609-11.

[212] *See, e.g.*, John Hecht, *Short Term Lending Update: Moving Forward with Positive Momentum* (2018) (Jefferies LLC, slide presentation) (on file); *see also* 82 FR 54472, 54609.

[213] 82 FR 54472, 54485 (noting that at least 11 States and jurisdictions that previously permitted payday lending took steps to restrict or eliminate such lending altogether).

lack the ability to protect themselves in selecting or using these products. And as with the Mann Study, as discussed above, the Bureau preliminarily believes that it cannot, in a timely and cost-effective manner for itself and for lenders and borrowers, develop sufficiently robust and reliable evidence that might or might not corroborate the Pew Study results. The Bureau seeks comment on the robustness and reliability of the evidence supporting this key finding, including comment on the weight the Bureau placed on the Pew Study, and on any other evidence that may bear on this finding.

4. Other Evidence Pertaining to Inability to Protect

In addition to the Pew Study, and as set out in part V.B.2 above, the Bureau pointed in the 2017 Final Rule to the structure of the loans themselves, expressing the belief that their short repayment periods and balloon payments may make it substantially harder for consumers to work themselves out of debt than if they were subject to a longer, slower repayment schedule.[214] As support for the findings in the 2017 Final Rule that the identified practice was abusive, the Bureau also pointed to a host of lender practices before, during, and after origination that the Bureau said tend to diminish consumers' ability to avoid or mitigate harms and protect their own interests in selecting or using covered products.[215]

As set forth in part V.B.2 above, the data identified in the 2017 Final Rule suggests that many consumers do use short-term loans as marketed—that is, as short-term or stop-gap measures, without initiating a prolonged sequence of reborrowing.[216] Further, evidence in the 2017 Final Rule showed that, while some lenders may discourage the use of repayment plans or

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[214] *Id.* at 54561.

[215] *Id.* at 54560-61.

[216] *Id.* at 54570-71.

off-ramps or otherwise encourage extended reborrowing, many consumers nevertheless avoid long reborrowing sequences and pay off their covered short-term and longer-term balloon-payment loans with no, or minimal, renewals.[217]

5. Conclusion

Based on its analysis in parts V.B.1 through V.B.4 above, the Bureau believes that the key evidentiary grounds relied upon in the 2017 Final Rule were insufficiently robust and reliable to support the findings of an unfair and abusive practice as identified in § 1041.4. The Bureau preliminarily concludes that neither the Bureau's interpretation of limited data from the Mann Study nor other sources on which the Bureau relied provide a sufficiently robust and representative evidentiary basis, in light of the expected impacts of the 2017 Final Rule, to conclude that consumers do not have a specific understanding of their personal risks and cannot accurately predict whether they will remain in long reborrowing sequences after taking out covered short-term and longer-term balloon-payment loans. The Bureau also preliminarily concludes that the Pew Study, and other evidence cited in support of the Pew Study, do not provide a sufficiently robust and reliable basis to conclude that consumers who use covered short-term or longer-term balloon-payment loans lack the ability to protect themselves in selecting or using these products. The Bureau further preliminarily concludes that the weaknesses in the evidentiary record on which the Bureau relied for the Mandatory Underwriting Provisions in the 2017 Final Rule is particularly problematic as a policy matter because these provisions will have dramatic effects, including eliminating many lenders and decreasing consumer access to financial products that they may want. Accordingly, the Bureau preliminarily believes that these conclusions are sufficient to rescind § 1041.4.

[217] *Id.* at 54704.

C. The Legal Findings under Section 1031 of the Dodd-Frank Act

In addition to, and independent from, its preliminary determination that the evidence relied upon in the 2017 Final Rule was insufficiently robust and reliable to support the Bureau's key findings underlying the unfairness and abusiveness determinations, the Bureau also preliminarily determines that the standards for unfairness and abusiveness used in the 2017 Final Rule were problematic for the reasons discussed below.

Specifically, as to the Bureau's unfairness findings in the 2017 Final Rule, the Bureau is making this preliminary conclusion about how the 2017 Final Rule applied: (1) section 1031(c)(1)(A) of the Dodd-Frank Act relating to determining whether injuries are reasonably avoidable, and (2) section 1031(c)(1)(B) about whether substantial injury is outweighed by countervailing benefits. The Bureau is also making this preliminary conclusion, as to the Bureau's abusiveness findings in the 2017 Final Rule, about how the 2017 Final Rule applied: (1) section 1031(d)(2)(A) relating to determining whether consumers lack understanding of the material costs, risks, or conditions of a consumer financial product or service; and (2) section 1031(d)(2) relating to the determination that lenders took unreasonable advantage of consumers by making covered short-term and balloon-payment loans without reasonably assessing borrowers' ability to repay such loans according to their terms.

Accordingly, as discussed further below, the Bureau preliminarily believes that the 2017 Final Rule should not have concluded that the identified practice was unfair and abusive. This preliminary conclusion is independent from the Bureau's preliminary conclusions regarding the evidentiary basis for the 2017 Final Rule. In other words, even if the evidence on which the 2017 Final Rule was based was sufficiently robust and reliable, the Bureau preliminarily believes that the Bureau should not have concluded in the 2017 Final Rule that the identified practice was unfair and abusive because the agency used problematic approaches, as discussed below, in applying the standards for unfairness and abusiveness.

1. Reasonable Avoidability

The Bureau determined in the 2017 Final Rule that making covered short-term or longer-term balloon-payment loans without reasonably assessing a borrower's ability to repay the loan according to its terms is an unfair act or practice. In making this determination, the Bureau concluded that this practice: (1) caused or was likely to cause substantial injury to consumers; (2) that that injury was not reasonably avoidable by consumers; and (3) that the injury was not outweighed by countervailing benefits to consumers or competition.[218] The Bureau believes the approach it used to reach these conclusions was problematic, as discussed below, and it now preliminarily proposes a better approach to applying the reasonable avoidability standard, incorporating the lessons of relevant precedent by the FTC. The Bureau preliminarily concludes that, even assuming that the factual findings in the 2017 Final Rule were correct and sufficiently supported, those findings did not establish that consumers could not reasonably avoid harm under the best interpretation of the statute, informed by relevant precedent.

As discussed in part V.A.1, the Bureau, in the Mandatory Underwriting Provisions of the 2017 Final Rule, interpreted section 1031(c)(1)(A) of the Dodd-Frank Act to mean that for an injury to be reasonably avoidable consumers must "have reason generally to anticipate the likelihood and severity of the injury and the practical means to avoid it."[219] As discussed above, the Bureau interpreted this standard in the 2017 Final Rule context as requiring consumers to

[218] *Id.* at 54588.

[219] *Id.* at 54594.

have a specific understanding of the magnitude and severity of their personal risks such that they could accurately predict how long they would be in debt after taking out a covered short-term or longer-term balloon-payment loan.[220] The Bureau acknowledged that such borrowers "typically understand that they are incurring a debt which must be repaid within a prescribed period of time and that, if they are unable to do so, they will either have to make other arrangements or suffer adverse consequences."[221] The Bureau also acknowledged that the Mann Study on which the Bureau so heavily relied found that most payday borrowers expected some repeated sequences of loans.[222] Nonetheless, the Bureau stated that "[t]he heart of the matter here is consumer perception of risk, and whether borrowers are in [a] position to gauge the likelihood and severity of the risks they incur by taking out covered short-term loans in the absence of any reasonable assessment of their ability to repay those loans according to their terms."[223] Because it found that consumers are not in a position to evaluate the risks, the Bureau found that consumers could not reasonably avoid the injuries.[224]

The Bureau is concerned that in the 2017 Final Rule it applied a problematic standard for reasonable avoidability under section 1031(c)(1)(A) of the Dodd-Frank Act.

In applying unfairness principles, the FTC and courts have long recognized that for an injury to be reasonably avoidable consumers must not only "know the physical steps to take in order to prevent it" but also "understand the necessity of actually taking those steps."[225] Put

[220] *Id.* at 54594-96.

[221] *Id.*at 54615.

[222] *Id.* at 54569.

[223] *Id.* at 54597.

[224] *Id.* at 54594; *see also id.* at 54597.

[225] *See Int'l Harvester*, 104 F.T.C. at 1066.

differently, "an injury is reasonably avoidable if consumers have reason to anticipate the impending harm and the means to avoid it."[226] The FTC Policy Statement emphasizes the importance of consumer choice in unfairness analysis. As the FTC Policy Statement explains, unfairness authority is not intended to "second-guess the wisdom of particular consumer decisions" and consumers are expected to "survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory."[227] Unfairness matters typically are brought to halt "some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking."[228] The Bureau finds these precedents informative as the Bureau considers how to apply section 1031(c)(1)(A) of the Dodd-Frank Act.

In assessing whether consumers could reasonably avoid harm, the Bureau in the 2017 Final Rule concluded that they could not without a specific understanding of their individualized risk, as determined by their ability to accurately predict how long they would be in debt after taking out a covered short-term or longer-term balloon-payment loan.[229] Even though the Bureau used this interpretation in the 2017 Final Rule, the Bureau now preliminarily concludes that consumers need not have a specific understanding of their individualized likelihood and magnitude of harm such that they could accurately predict how long they would be in debt after taking out a covered short-term or longer-term balloon-payment loan for the injury to be reasonably avoidable. To require that consumers know their individualized likelihood and

[226] *Davis v. HSBC Bank Nev., N.A.,* 691 F.3d 1152, 1168 (9th Cir. 2012), *quoting Orkin Exterminating Co., Inc. v. F.T.C.,* 849 F.2d 1354, 1365-66 (11th Cir. 1988).

[227] FTC Policy Statement, *Int'l Harvester,* 104 F.T.C. 1074.

[228] *Id.* The FTC Policy Statement offers examples of such misbehavior, including withholding critical information, engaging in overt coercion, or exercising undue influence over susceptible classes of purchasers.

[229] 82 FR 54472, 54597-98.

magnitude of harm from an act or practice to reasonably avoid their effects inflates the injury from them, would practically speaking shift the burden to lenders to make such determinations, thereby deterring lenders from offering products or product features, which effectively suppresses rather than facilitates consumer choice.

This particular problem with the 2017 Final Rule is illustrated by how the Bureau responded to several comments that urged the Bureau to mandate consumer disclosures instead of imposing an ability-to-repay requirement. In rejecting that suggestion, the Bureau stated that "generalized or abstract information" about the attendant risks would "not inform the consumer of the risks of the particular loan in light of the consumer's *particular* financial situation."[230] The Bureau went on to state that "[t]he only disclosure that the Bureau could envision that could come close to positioning consumers to mitigate the unfair and abusive practice effectively would be an *individualized* forecast" and that such "an individualized disclosure might require more compliance burden than the [Mandatory Underwriting Provisions in the Final Rule] to the extent that it would require a lender to forecast how many rollovers or how much re-borrowing might be required in the event that a consumer is not likely to repay the entire balance during the initial loan term."[231]

Thus, according to the 2017 Final Rule, many consumers are unable to reasonably avoid injury because they are unable to examine their own circumstances, the loan terms, and the typical loan performance in these markets, and determine from this information both their personal likelihood of timely repayment and the seriousness of the consequences if they fail to repay. The application of reasonable avoidability in the 2017 Final Rule contemplates that

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[230] *Id.* at 54637 (emphasis added).

[231] *Id.* (emphasis added).

consumers cannot reasonably avoid harm even though they have a general knowledge that difficulty repaying (either temporarily or permanently) could occur and could lead them either to reborrow or default and experience adverse credit reporting, collections efforts, and even repossessions, liens, and garnishment of wages. Indeed, under the 2017 Final Rule's interpretation, consumers cannot reasonably avoid injury even if they recognize that they will be unable to repay the loan when initially due and will need to borrow but are uncertain as to precisely how long it will take them to be able to fully pay off the debt. Rather than consider whether consumers have reason to anticipate the impending harm and the means to avoid it, the Bureau interpreted the standard as requiring consumers to understand the *specific* likelihood and severity of potential harm to them.

Upon further consideration, the Bureau now preliminarily believes that using this reasonable avoidability standard was problematic. Whether through disclosure or through underwriting, the logic the Bureau applied in the 2017 Final Rule requires providers of covered short-term and longer-term balloon-payment loans to engage in extremely detailed, specific action with regard to particular consumers to correct for the consumers' individualized understanding—or lack of understanding—about their own finances and likely experiences with such loans.

As discussed in part IV, FTC Act precedent informs the Bureau's understanding of the unfairness standard under section 1031(c)(1)(A) of the Dodd-Frank Act. Accordingly, the Bureau considers FTC precedents when evaluating whether an act or practice causes harm or is likely to cause harm that is reasonably avoidable by consumers pursuant to section 1031(c)(1)(A) of the Dodd-Frank Act. When analyzing unfairness under the FTC Act, the FTC and courts have held that "an injury is reasonably avoidable if consumers have reason to anticipate the impending harm and the means to avoid it,"[232] meaning that "people know the physical steps to take in order to prevent" injury,[233] but "also . . . understand the necessity of actually taking those steps."[234] Under this approach, whether a consumer can anticipate and avoid injury through consumer choice informs whether that injury is reasonably avoidable.[235] In some cases, consumer injury was not reasonably avoidable because a potential harm was not disclosed and consumers could not anticipate that harm from prior experience.[236] In other cases, firms have engaged in deception or outright coercion to prevent the exercise of free consumer choice.[237] However, the Bureau has not identified relevant precedent suggesting that consumers must understand their own specific individualized likelihood and magnitude of harm to reasonably avoid injury or requiring the disclosure of such information to prevent injury. A disclosure that generally alerts consumers to the likelihood and magnitude of harm generally has been sufficient to avoid a finding that consumers did not appreciate the value of taking steps to avoid that harm.[238]

The Bureau's approach to reasonable avoidability is also consistent with trade regulation rules promulgated by the FTC over several decades to address unfair or deceptive practices that

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[232] *See Davis,* 691 F.3d at 1168.

[233] *See Int'l Harvester*, 104 F.T.C. at 1066.

[234] *Id*.

[235] *See Orkin*, 849 F.2d at 1365.

[236] *See id.* ("consumer choice was impossible" when company raised annual fees without a contractual basis for lifetime termite protection services); *Int'l Harvester,* 104 F.T.C. at 1066. ("Farmers may have known that loosening the fuel cap was generally a poor practice, but they did not know from the limited disclosures made, nor could they be expected to know from prior experience, the full consequences that might follow from it.").

[237] *See F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 236, at 245-46 (3rd Cir. 2015) (injury from data breaches was not reasonably avoidable because of misleading privacy policy that overstated the company's data security practices); *Holland Furnace Co. v. F.T.C.*, 295 F.2d 302 (7th Cir. 1961) (company representatives dismantled furnaces without permission and refused to reassemble them until consumers agreed to buy services or parts).

[238] *See, e.g., Int'l Harvester,* 104 F.T.C. 949, at *46 (noting that the dissemination of the disclosure —"AVOID FIRES. TIGHTEN cap securely, Do not open when engine is RUNNING or HOT"—would have made the injury from fuel geysering reasonably avoidable).

occur on industry-wide bases.[239] To prevent such conduct, the FTC has routinely established disclosure requirements that mandate businesses provide to consumers general information about material terms, conditions, or risks related to products or services.[240] However, no FTC trade regulation rule based on unfairness has required businesses to provide individualized forecasts or disclosures of each customer's or prospective customer's own specific likelihood and magnitude of potential harm.[241]

The Bureau preliminarily believes that it should interpret the reasonable avoidability standard as not necessarily requiring payday borrowers to have a specific understanding of their personal risks such that they can accurately predict how long they will be in debt after taking out a covered short-term or longer-term balloon-payment loan. Indeed, by virtue of the fact that many payday borrowers experience income and debt volatility, the 2017 Final Rule effectively presupposed that payday borrowers *per se* cannot reasonably avoid injury. The Bureau now preliminarily believes that the injury is reasonably avoidable if payday borrowers have an understanding of the likelihood and magnitude of risks of harm associated with payday loans sufficient for them to anticipate those harms and understand the necessity of taking reasonable steps to prevent resulting injury. Specifically, this means consumers need only to understand

[239] Section 18 of the FTC Act provides that the FTC is authorized to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of section 5 of the FTC Act. 15 U.S.C. 57a. The FTC's trade regulation rules are codified at 16 CFR part 400.

[240] *See, e.g., Use of Prenotification Negative Option Plans Rule*, 16 CFR 425.1(a)(1) (promotional material must clearly and conspicuously disclose material terms); *Funeral Industry Practices Rule*, 16 CFR 453.2(b) (requiring itemized price disclosures of funeral goods and services and other non-consumer specific disclosures); *Credit Practices Rule*, 16 CFR 444.3 (prohibiting certain practices and requiring disclosures about cosigner liability).

[241] For example, the Credit Practices Rule requires that a covered creditor to provide a "Notice to Cosigner" disclosure prior to a cosigner becoming obligated on a loan. This notice advises in a concise and general manner consumers who cosign obligations about their potential liability. This notice is not individually-tailored and does not require a covered creditor to disclose information about the severity or likelihood of risks related to cosigner liability. *See* 16 CFR 444.3.

that a significant portion of payday borrowers experience difficulty repaying and that if such borrowers do not make other arrangements they either end up in extended loan sequences, default, or struggle to pay other bills after repaying their payday loan. The Bureau now preliminarily concludes that this approach, consistent with the FTC's longstanding approach on informed consumer decision-making in its interpretation of the unfairness standard, is the best interpretation of section 1031(c)(1)(A) as a legal and policy matter. In the Bureau's preliminary judgment, this approach appropriately emphasizes informed consumer decision-making.[242]

Applying an interpretation consistent with FTC precedent, the Bureau preliminarily believes that, assuming for present purposes that the identified practice causes or is likely to cause substantial injury, consumers can reasonably avoid that injury. As noted above, in the 2017 Final Rule, the Bureau expressly found that payday loan borrowers "typically understand they are incurring a debt which must be repaid within a prescribed period of time and that, if they are unable to do so, they will either have to make other arrangements or suffer adverse consequences."[243] Payday loans are advertised as products designed to assist consumers who are in financial distress, which tends to create general awareness that payday borrowers may not necessarily be in a position to readily obtain cheaper forms of credit. In light of their limited options and financial volatility, payday borrowers may infer that there are risks associated with

[242] As the FTC stated in the FTC Policy Statement: "[W]e expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory." FTC Policy Statement, *Int'l Harvester,* 104 F.T.C. at 1074. *See also Orkin,* 849 F.2d at 1365 ("The Commission's focus on a consumer's ability to reasonably avoid injury 'stems from the Commission's general reliance on free and informed consumer choice at the best regulator of the market.'") (*quoting Am. Fin. Serv. Ass'n v. F.T.C.,* 767 F.2d 957, 976 (D.C. Cir. 1985)).

[243] 82 FR 54472, 54615.

taking the loans. Indeed, as previously noted, the Bureau expressly acknowledged that the Mann Study on which the Bureau so heavily relied found that most payday borrowers expected some repeated sequences of loans. The Bureau also notes that a significant portion of longer-term borrowers—who were the Bureau's primary concern in the 2017 Final Rule—have previously used covered short-term and longer-term balloon-payment loans and personally experienced extended loan sequences.[244] Consumers who have reborrowed in the past would seem particularly likely to have an understanding that such reborrowing is relatively common even if they cannot predict specifically how long they will need to borrow. Further, a Bureau analysis of a study of State-mandated payday loan disclosures—which inform consumers about repayment and reborrowing rates—found that such disclosures had a limited impact on reducing payday loan use and, in particular, reborrowing.[245] The majority of consumers in the study continued to take out payday loans despite the disclosures. A plausible explanation for the limited effect of disclosures on consumer behavior in this study is that payday loan users were already aware that such loans can result in extended loan sequences.

The Bureau in the 2017 Final Rule did not offer evidence that would support the conclusion that consumers cannot reasonably avoid substantial injury from taking out payday loans when applying a standard that focuses on a more generalized understanding of likelihood and magnitude of harm from taking out such loans. The Bureau also found in the 2017 Final Rule that consumers who would not be offered a payday loan under either § 1041.5 or § 1041.6 would have alternatives to payday loans.[246] Accordingly, the Bureau preliminarily believes that

[244] *Id. at* 54597.

[245] *Id. at* 54577-78; *see* Tex. Office of Consumer Credit Comm'r, *Credit Access Businesses*, http://occc.texas.gov/industry/cab.

[246] 82 FR 54472, 54840-41.

there is not a sufficient evidentiary basis on which to find that consumers cannot reasonably avoid substantial injury caused or likely to be caused by lenders making covered short-term and longer-term balloon-payment loans without assessing borrowers' ability to repay.

The Bureau seeks comments on this issue, including comment on the Bureau's proposed revised interpretation of reasonable avoidability under section 1031(c)(1) of the Dodd-Frank Act. The Bureau requests comment about the types or sources of information with respect to consumer understanding about covered short-term and longer-term balloon-payment loans that would be pertinent to a determination of whether consumers can reasonably avoid the substantial injury caused or likely to be caused by the identified practice.

2. Countervailing Benefits to Consumers and to Competition

After determining in the 2017 Final Rule that the identified practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by them, the Bureau went on to determine that such substantial injury is not outweighed by countervailing benefits to consumers or to competition. This is a necessary element of an unfairness determination under section 1031(c)(1)(B) of the Dodd-Frank Act. The Bureau now revisits this latter determination and believes certain countervailing benefits from the identified practice were greater than the Bureau found in the 2017 Final Rule. Even assuming *arguendo* that the identified practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable, the Bureau now revalues and determines that the countervailing benefits under the unfairness analysis were greater than the Bureau found in the 2017 Final Rule, and now preliminarily believes that the benefits to consumers and competition from the practice outweigh any such injury.

a. Reconsideration of the Dependence of the Unfairness Identification on the Principal Step-Down Exemption

Section 1031(b) of the Dodd-Frank Act authorizes the Bureau to prescribe rules "identifying as unlawful unfair, deceptive, or abusive acts or practices" if the Bureau makes the requisite findings with respect to such acts or practices.[247] The Bureau exercised this authority in § 1041.4 to determine that it is unfair and abusive for a lender to make covered loans "*without reasonably determining that the consumers will have the ability to repay the loans according to their terms*."[248] The Bureau also exercised its authority under section 1031(b) of the Dodd-Frank Act to impose "requirements for the purpose of preventing such acts or practices" by adopting requirements in § 1041.5 for how lenders should go about making such an ability-to-repay determination.[249]

In the section 1022(b)(2) analysis of the 2017 Final Rule, the Bureau estimated that if lenders ceased to engage in the identified practice and instead followed the mandatory underwriting requirements designed to prevent that practice, only one-third of current borrowers would be able to obtain any loans and, of those who obtained a loan, only one-third would be able to obtain a subsequent loan.[250] The end result, the Bureau estimated, would be to eliminate between 89 and 93 percent of all loans.[251]

In conducting its countervailing benefits analysis, however, the Bureau in the 2017 Final Rule did not address the benefits to consumers or competition from lenders making covered

[247] 12 U.S.C. 5531(b).

[248] 12 CFR 1041.4 (emphasis added).

[249] 12 U.S.C. 5531(b); 12 CFR 1041.5.

[250] 82 FR 54472, 54833.

[251] *Id.* at 54826 (storefront payday), 54834 (vehicle title).

short-term and longer-term balloon-payment loans without an ability-to-repay determination. Rather than focusing on the effects of the identified practice itself, the Bureau interjected into its analysis the effect of Rule provisions that were intended to mitigate the general effects of the requirement that lenders make an ability-to-repay determination. Specifically, the Bureau included in its countervailing benefits analysis the principal step-down exemption in § 1041.6. The principal step-down exemption permits a certain number of covered short-term and longer-term balloon-payment loans to be made without assessing the consumer's ability to repay so long as the loans meet a series of other conditions, including a requirement that the loan amount is amortized over successive loans by stepping down the principal over such loans. None of these conditions involve any ability-to-repay determination by the lender. Rather, the conditions generally focus on whether the loan amount is amortized (stepped down) over successive loans. The Bureau anticipated that the principal step-down exemption would actually be the predominant approach that payday lenders would use to comply with the Mandatory Underwriting Provisions, because of the substantial burdens the Mandatory Underwriting Provisions would impose on lenders.

The principal step-down exemption was not part of the identified practice. Rather, the exemption was added pursuant to the Bureau's authority to create exemptions which the Bureau deems "necessary or appropriate to carry out the purposes and objectives of" Title X of the Dodd-Frank Act.[252]

The Bureau in the 2017 Final Rule did not consider in the countervailing benefits analysis the full benefits to consumers and competition from the identified practice of lenders making covered loans without making an ability-to-repay determination. In the words of the Bureau, the

[252] 12 U.S.C. 5512(b)(3).

combination of the mandatory underwriting requirements plus the principal step-down exemption meant that only a "relatively limited number of consumers" would face a "restriction on covered loans" which "reduces the weight on this [the countervailing benefits] side of the scale."[253] This weight would have been much greater had the Bureau properly considered the full benefits from lenders engaging in the identified practice.

The Bureau preliminarily believes that the approach taken by the Bureau in the 2017 Final Rule puts the proverbial cart before the horse. The principal step-down exemption is a carve-out from requirements adopted to prevent an identified unfair and abusive practice. Thus, a predicate for the exemption, as pertinent here, is the existence of an act or practice which is unfair—which is to say, the existence of an act or practice for which the substantial injury outweighs countervailing benefits to consumers or to competition. It follows 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.

As the FTC Policy Statement explains, "[m]ost business practices entail a mixture of economic and other costs and benefits for purchasers. . . . The [FTC] is aware of these tradeoffs and will not find that a practice unfairly injures consumers unless it is injurious in its net effects."[254] In the 2017 Final Rule, the Bureau declared a practice unfair based on its aggregate costs to consumers, but in doing so it relied analytically on a large-scale exemption to avoid fully considering the practice's benefits, thereby inflating the costs of the practice relative to its benefits. Because the Bureau did not confront the total tradeoffs between the benefits and costs

[253] 82 FR 54472, 54609, 54603.

[254] *See* FTC Policy Statement, *Int'l Harvester*, 104 F.T.C. at 1073.

of the identified practice, the Bureau now preliminarily believes that the 2017 Final Rule undervalued countervailing benefits. Doing so may brand business practices as unfair when they are beneficial on net to consumers or competition.

Accordingly, the Bureau preliminarily believes that when evaluating the countervailing benefits of the identified practice, the Bureau should have accounted for the complete benefits from that practice. The complete benefits to consumers and competition should reflect the benefits to consumers that would be lost if the identified practice were prohibited. Otherwise, it is not possible to accurately assess (as the Bureau now preliminarily interprets the unfairness test as requiring) whether the benefits of making such loans without determining ability to repay outweigh the injury from doing so.

b. Effect of Undervaluing Countervailing Benefits

The Bureau also preliminarily believes that after fully accounting for the countervailing benefits—including benefits it disregarded in the 2017 Final Rule because of its reliance on the principal step-down exemption and also other benefits that it acknowledged but, in the Bureau's current view, undervalued—any aggregate injury to consumers caused by the identified practice is outweighed by the aggregate countervailing benefits to consumers and competition of that practice.

As the Bureau noted in the 2017 Final Rule, the relevant question under section 1031(c)(1)(B) of the Dodd-Frank Act is whether the countervailing benefits "outweigh the substantial injury that consumers are unable reasonably to avoid and that stems from the identified practice." The Bureau approaches this determination by first weighing the relevant injury in the aggregate (taking the findings of the 2017 Rule as a given because it need not reconsider them here), then weighing countervailing benefits in the aggregate, and then assessing which of the two predominates.[255]

i. Countervailing Benefits to Consumers

In the 2017 Final Rule, the Bureau analyzed the countervailing benefits separately for three segments of consumers, defined by their *ex post* behavior: repayers (those who repay a covered short-term or longer-term balloon-payment loan when due without the need to reborrow within 30 days); reborrowers (those who eventually repay the loan but after one or more instances of reborrowing); and defaulters (those who default either on an initial loan or on a subsequent loan that is part of a sequence of loans).[256] The Bureau follows the same framework here. At the same time, the Bureau requests comment on whether these are the appropriate categories within which to analyze the existence of countervailing benefits.

Repayers. In between 22 percent and 30 percent of payday loan sequences[257] and a smaller slice of vehicle title sequences,[258] borrowers obtain a single loan, repay it in full when first due, and do not reborrow again for a period of 14 to 30 days thereafter. In conducting the countervailing benefits analysis in the 2017 Final Rule with respect to repayers, the Bureau did not suggest that the identified practice was without benefit to these repayers. Rather, the

[255] 82 FR 54472, 54602. "Injury is weighed in the aggregate, rather than simply on a consumer-by-consumer basis," and conversely "the countervailing benefits to consumers are also measured in the aggregate, and the Bureau includes the benefits even to those consumers who, on net, were injured." *Id.* at 54591.

[256] *Id.* at 54599-600.

[257] *See* Supplemental Findings at 120. The higher number uses a 14-day definition of loan sequence and thus includes consumers who repay their first loan and do not borrow within the ensuing two weeks. The lower number uses a 30-day definition and thus counts only those who do not reborrow within 30 days after repayment.

[258] *See* Bureau of Consumer. Fin. Prot., *Single-Payment Vehicle Title Lending*, at 11 (May 2016), https://files.consumerfinance.gov/f/documents/201605_cfpb_single-payment-vehicle-title-lending.pdf (11 to 13 percent).

Bureau's countervailing benefits analysis in the 2017 Final Rule effectively acknowledged the identified practice had benefits for some repayers because the Rule recognized that it was important to avoid "false negatives," *i.e.*, consumers who in fact have the ability to repay but who could not establish it *ex ante*.[259] However, the Bureau determined that these countervailing benefits were "minimal," in part because the Bureau anticipated that lenders would make substantially all the loans permitted by the Mandatory Underwriting Provisions of the 2017 Final Rule and in part because the Bureau believed that the principal step-down exemption would mitigate any false negative concerns.[260]

The Bureau now believes that in the 2017 Final Rule it understated the risk that, under the mandatory underwriting requirements, some consumers who would be repayers and would benefit from receiving a loan would nonetheless be denied a loan. This risk arises in part from the difficulty some borrowers may have in proving their ability to repay and in part from that the fact that some lenders may choose to "over-comply" in order to reduce their legal exposure. Although the 2017 Final Rule minimized the possibility that lenders would take a "conservative approach . . . due to concerns about compliance risk,"[261] the Bureau now preliminarily believes that somewhat greater weight should be placed on this risk. The Bureau's experience in other markets indicates that some lenders generally seek to take steps to avoid pressing the limits of the law.

Moreover, from the perspective of the repayers, there may also be significant effects of requiring lenders to make ability-to-repay determinations that might be termed "system" effects. As previously noted, the 2017 Final Rule's assessment of benefits and costs estimated that, if

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[259] *See* 82 FR 54472, 54603-04.

[260] *Id.*

[261] *Id.* at 54603.

covered short-term or longer-term balloon-payment loans could be made only to those consumers with an ability to repay in a single installment without reborrowing, lenders would not make upwards of 90 percent of all loans and of course not receive revenue from loans that are not made. At a minimum, that would lead to a vast constriction of supply. The Bureau believes that a 90 percent reduction in revenue would produce at least a corresponding reduction in supply[262] and could have even a more profound effect if the remaining revenue were insufficient to sustain the business model. In other words, the Bureau preliminarily believes that one of the countervailing benefits of permitting lenders to engage in the identified practice is that it makes it possible to offer loans on a wide-scale basis to the repayers. Prohibiting such lending will necessarily decrease the ability of the repayers to obtain covered short-term and longer-term balloon-payment loans.

Reborrowers. As the Bureau noted in the 2017 Final Rule, over 55 percent of both payday and vehicle title sequences result in the consumer reborrowing one or more times before finally repaying and not borrowing again for 30 days.[263] The Bureau acknowledged that some of these borrowers who are unable to repay in a single installment (*i.e.*, without reborrowing) may nonetheless benefit from having access to covered short-term and longer-term balloon-payment loans because the borrowers may be income-smoothing across a longer time span. These borrowers also may benefit because they may face eviction, overdue utility bills, or other types of expenses, with paying such expenses sometimes creating benefits for consumers that outweigh

[262] *See id.* at 54817, 54842 (estimating that the 2017 Final Rule as a whole, including the principal step-down exemption, would reduce loan volume by between 62 and 68 percent and would result in a corresponding reduction in the number of retail outlets).

[263] *Id.* at 54605.

the costs associated with the payday loan sequence. But the Bureau stated that the principal step-down exemption—which it said is "worth emphasizing" in this context—would "reduc[e] the magnitude" of the countervailing benefits flowing from the identified practice.[264] After taking into account this reduction, the Bureau concluded, however, that the remaining countervailing benefits were outweighed by the injury to those reborrowers who find themselves "unexpectedly trapped in extended loan sequences."[265]

On its own terms, this reasoning has no applicability with respect to vehicle title reborrowers for whom the principal step-down exemption would not be available and who thus would lose the ability to income smooth over more than one vehicle title loan or deal with the expenses referenced above. This reasoning similarly does not apply to payday loan reborrowers who cannot qualify for the principal step-down exemption, for example, borrowers who find that they have a new need for funds but have already exhausted the various borrowing limits imposed by the exemption.[266] Moreover, as explained above, the Bureau believes that this reliance on the principal step-down exemption was misplaced.

The Bureau preliminarily believes that the consequences of this reliance on the exemption are profound. Under an ability-to-repay regime, assuming the systemic effects did not eliminate the industry completely, most of the 58 percent of payday borrowers or 55 percent of vehicle title borrowers would lose access to covered short-term and longer-term balloon-payment loans on the grounds that reborrowers lack the ability to repay the loans according to their terms. To the extent some consumers passed an ability-to-repay assessment and needed to reborrow, most would be precluded from taking out a second loan. In other words, the practice

[264] *Id.* at 54606.

[265] *Id.* at 54605.

[266] 12 CFR 1041.6.

of making covered short-term or longer-term balloon-payment loans to consumers who cannot satisfy the mandatory underwriting requirement is the linchpin of enabling the reborrowers to access these type of loans.

The Bureau acknowledges that among reborrowers there is a sizable segment of consumers who end up in extended loan sequences before repaying and thus incur significant costs. But even for these borrowers, there is some countervailing benefit in being able to obtain access to credit, typically through the initial loan, that is used to meet what the Bureau acknowledged in the 2017 Final Rule to be an "urgent need for funds"[267]—for example, to pay rent and stave off an eviction or a utility bill and avoid a shutdown, or to pay for needed medical care or food for their family.[268] Moreover, over 35 percent of the reborrowers required only between one and three additional loans before being able to repay and stop borrowing for 30 days and an additional almost 20 percent of the reborrowers required between four and six additional loans before being able to repay.[269] These shorter-term reborrowers would forgo any benefits associated with these additional loans if lending was limited to those who can demonstrate an ability to repay in a single installment.

In sum, the Bureau preliminarily believes that there are substantial countervailing benefits for reborrowers that flow from the identified practice that the Bureau now preliminarily

[267] 82 FR 54472, 54620.

[268] As discussed in the Rule, *id.* at 54538, surveys which ask borrowers about the reasons for borrowing may elicit answers regarding the immediate use to which the loan proceeds are put or about a past expense shock that caused the need to borrow, making interpretation of the survey results difficult. But what seems beyond dispute is that these borrowers have a pressing need for additional money.

[269] *See* Supplemental Findings at 122 (fig. 36).

believes should not have been discounted in the 2017 Final Rule by relying on the principal step-down exemption.

Defaulters. The third group of borrowers discussed in the 2017 Final Rule were those whose sequences end in default. As to this group, representing 20 percent of payday borrowers[270] and 32 percent of vehicle title borrowers,[271] the Bureau acknowledged that "these borrowers typically would not be able to obtain loans under the terms of the final rule" (and thus the Bureau did not rely on the principal step-down exemption in assessing the effects on these consumers).[272] The Bureau went on to note that "losing access to non-underwritten credit may have consequences for some consumers, including the ability to pay for other needs or obligations" and the Bureau stated that this is "not an insignificant countervailing benefit."[273] But the Bureau went on to state that these borrowers "are merely substituting a payday lender or title lender for a preexisting creditor" and obtaining "a temporary reprieve."[274]

Of course, it is not necessarily true that all defaulters use their loan proceeds to pay off other outstanding loans; at least some use the money to purchase needed goods or services, such as medical care or food. Moreover, the Bureau is now concerned that in the 2017 Final Rule it may have minimized the value to consumers of substituting a payday lender for other creditors, such as a creditor with the power to initiate an eviction or shut off utility services or refuse medical care. The Bureau is also concerned that the 2017 Final Rule may have minimized the

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[270] *See id.* at 120 (tbl. 23).

[271] *See* Bureau of Consumer. Fin. Prot., *Single-Payment Vehicle Title Lending*, at 11 (May 2016), https://files.consumerfinance.gov/f/documents/201605_cfpb_single-payment-vehicle-title-lending.pdf.

[272] 82 FR 54472, 54604.

[273] *Id.*

[274] *Id.* at 54604, 54590.

value of a "temporary reprieve" which may enable defaulters to stave off more dire consequences than the consequences of defaulting on a payday loan.

Conclusion. In sum, the Bureau now preliminarily believes that the 2017 Final Rule's approach to its countervailing benefits analysis caused it to underestimate the countervailing benefits in terms of access to credit that flows from the identified practice. It is not just the benefit of access to credit for those payday loan consumers who would lose access under the principal step-down exemption that should be weighed; rather the systemic effects of ending the identified practice and eliminating over 90 percent of all payday and vehicle title loans would adversely affect the interests of all borrowers—including even those with the ability to repay. Furthermore, the Bureau now preliminarily believes that it underestimated the benefits of access to credit for a large segment of reborrowers and even for some defaulters—including the benefits of a temporary reprieve, of substituting a payday or vehicle title lender for some other creditor and, for the reborrowers, the benefit of smoothing income over a period longer than a single two-week or 30-day loan. The Bureau preliminarily believes that after giving full and appropriate weight to the interests of all affected consumers, the countervailing benefits to consumers that flow from the practice of making covered short-term and longer-term balloon-payment loans without making an ability-to-repay determination outweigh the substantial injury that the Bureau considered in the 2017 Final Rule to not be reasonably avoidable by consumers. The Bureau invites comment on these preliminary conclusions.

ii. Countervailing Benefits to Competition

As with its discussion of the countervailing benefits to consumers, the 2017 Final Rule analyzed the countervailing benefits to competition through the lens of the principal step-down exemption. Specifically, the 2017 Final Rule acknowledged that "a certain amount of market consolidation may impact … competition" but asserted that this effect would be modest and would not reduce meaningful access to credit because of the principal step-down exemption.[275] For the reasons previously discussed, the Bureau now preliminarily believes that the Bureau should not have factored into its analysis this exemption but rather should have analyzed the effect on competition from the identified practice under which lenders would be able to make upwards of 90 percent of the loans they would not be able to make if the identified practice were determined to be unfair. The Bureau preliminarily believes that the loss of revenue from these loans and in the corresponding reduction in supply would have a dramatic effect on competition, especially if lenders cannot stay in business in the face of such decreases in revenue.

The Bureau recognizes that because of State-law regulation of interest rates, the effect of reduced competition may not manifest itself in higher prices. However, payday and vehicle title lenders compete on non-price dimensions and a rule which caused at least a 90 percent reduction in revenue and supply would likely materially impact such competition.

The Bureau also notes that, as the 2017 Final Rule recognized, a number of innovative products are seeking to compete with traditional short-term lenders by assisting consumers in finding ways to draw on the accrued cash value of wages they have earned but not yet paid, and that some of these products take the form of extensions of credit.[276] Other innovators are providing emergency assistance at no cost to consumers through a tip model.[277] The 2017 Final Rule included exclusions to accommodate these emerging products, thereby recognizing that providers offering these products were doing so without assessing the consumers' ability to repay without reborrowing. The Bureau therefore preliminarily believes that a prohibition of

[275] 82 FR 54472, 54611-12.

[276] 12 CFR 1041.3(d)(7).

[277] 12 CFR 1041.3(d)(8).

making short-term or balloon-payment loans without assessing consumers' ability to repay would constrain innovation in this market.

The Bureau preliminarily believes that these countervailing benefits to competition provide an additional reason to conclude that the countervailing benefits to consumers and to competition outweigh the substantial injury that the Bureau considered in the 2017 Final Rule to not be reasonably avoidable by consumers. The Bureau invites comment on these preliminary conclusions.

3. Lack of Understanding of Material Risks, Costs, or Conditions

As discussed in part V.A.2 above, under section 1031(d)(2)(A) of the Dodd-Frank Act it is an abusive practice to take unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, or conditions of a consumer financial product or service. In the Mandatory Underwriting Provisions of the 2017 Final Rule, the Bureau took a similar approach to interpreting this provision as it took with respect to the reasonable avoidability element of unfairness. The Bureau interpreted the statute to mean that consumers lack understanding if they fail to understand either their personal "likelihood of being exposed to the risks" of the product or service in question or "the severity of the kinds of costs and harms that may occur."[278]

Unlike the elements of unfairness specified in section 1031(c) of the Dodd-Frank Act, the elements of abusiveness do not have a long history or governing precedents. Rather, the Dodd-Frank Act marked the first time that Congress defined "abusive acts or practices" as generally unlawful in the consumer financial services sphere. The Bureau preliminarily believes that this element of the abusiveness test for this proposal should be treated as similar to reasonable

[278] 82 FR 54472, 54617.

avoidability. That is, the Bureau now preliminarily believes that the approach taken in the 2017 Final Rule was problematic, as discussed below, and now applies an approach under which "lack of understanding" would not require payday borrowers to have a specific understanding of their personal risks such that they can accurately predict how long they will be in debt after taking out a covered short-term or longer-term balloon-payment loan. Rather, the Bureau preliminarily believes that consumers have a sufficient understanding under section 1031(d)(2)(A) of the Dodd-Frank Act if they appreciate the general risks of harm associated with the products sufficient for them to consider taking reasonable steps to avoid that harm. The Bureau in the 2017 Final Rule did not offer evidence that consumers lack such an understanding with respect to the material risks, costs or conditions on covered short-term and longer-term balloon-payment loans. In the absence of such evidence, the Bureau preliminarily believes it should not have concluded in the 2017 Final Rule that the identified practice was an abusive act or practice pursuant to section 1031(d)(2)(A) of the Dodd-Frank Act.

For these reasons, which are set forth in more detail in part V.C.1 above regarding reasonable avoidability, the Bureau has preliminarily determined that its interpretation of "lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service" in the 2017 Final Rule was too broad. The Bureau seeks comment on this issue, including comment on how the Bureau should interpret section 1031(d)(2)(A) of the Dodd-Frank Act.

4. Taking Unreasonable Advantage

The Bureau is also reconsidering how the 2017 Final Rule applied section 1031(d)(2) of the Dodd-Frank Act, which proscribes abusive conduct that takes "unreasonable advantage" of certain consumer vulnerabilities enumerated in the statute. As described above, the Bureau focused on two such vulnerabilities in connection with evaluating lenders making covered loans without making an ability-to-repay determination—both lack of consumer understanding and inability to protect their own interests. The Bureau stated that there comes a point at which a financial institution's conduct in leveraging its superior information or bargaining power relative to consumers becomes unreasonable advantage-taking, and that the Dodd-Frank Act delegates to the Bureau the responsibility for determining when advantage-taking has become unreasonable.[279] The Bureau's unreasonable advantage analysis applied a multi-factor analysis, concluding that:

> At a minimum lenders take unreasonable advantage of borrowers when they [1] develop lending practices that are atypical in the broader consumer financial marketplace, [2] take advantage of particular consumer vulnerabilities, [3] rely on a business model that is directly inconsistent with the manner in which the product is marketed to consumers, and [4] eliminate or sharply limit feasible conditions on the offering of the product (such as underwriting and amortization, for example) that would reduce or mitigate harm for a substantial population of consumers.[280]

The Bureau has decided to reassess this application of section 1031(d)(2) of the Dodd-Frank Act. This inquiry is inherently a question of judgment in light of the factual, legal, and policy factors that can inform what is reasonable or unreasonable in particular circumstances. Upon further consideration, the Bureau preliminarily concludes that the factors cited in the 2017 Final Rule do not constitute unreasonable advantage-taking.

First, insofar as the Bureau in the 2017 Final Rule focused on the atypicality of granting credit without assessing ability to repay, the Bureau now questions whether this practice is an appropriate indicator of unreasonable advantage-taking. Although the Bureau pointed to the fact that the practice of extending credit without assessing ability to repay is an unusual one, it is

[279] *Id.* at 54621.

[280] *Id.* at 54623 (bracketed numbers added).

actually common with regard to credit products for consumers who lack traditional indicia of creditworthiness—for example, credit products for consumers with little or no credit history, loans for students, or reverse mortgages for the elderly. Further, the Bureau believes that innovators and new entrants into product markets often engage in practices that deviate from established industry norms and conventions. Many such practices are by definition atypical. Thus, to presume that atypicality is inherently suggestive of unreasonable advantage-taking would risk stifling innovation. These all suggest that even if the lack of underwriting were atypical, it still should not be viewed as inherently suggestive of unreasonable advantage-taking, given differences between particular consumer financial markets and the needs of their respective consumers.

Second, on taking advantage of particular consumer vulnerabilities, as discussed above, the Bureau preliminarily believes that limitations in the Rule's evidentiary record, including issues related to the Mann Study and the Pew Study, call into question the Bureau's findings regarding the degree of vulnerabilities of covered short-term and longer-term balloon-payment loan users. But even if the Bureau's findings in the 2017 Final Rule regarding user vulnerabilities are valid, the Bureau now preliminarily does not believe that they would independently support an unreasonable advantage-taking determination. The "takes unreasonable advantage of" element in section 1031(d)(2) of the Dodd-Frank Act requires that an act or practice take advantage of a vulnerability specified by, as relevant here, section 1031(d)(2)(A) (lack of understanding) or section 1031(d)(2)(B) (inability to protect). The Bureau now believes that the 2017 Final Rule did not adequately explain how the practice of not reasonably assessing a consumer's ability to repay a loan according to its terms leveraged particular consumer vulnerabilities. On the contrary, covered short-term and longer-term balloon-payment loans are made available to the general public on standard terms, and the 2017 Final Rule did not conclude, for example, that lenders had the ability to identify consumers with particular vulnerabilities prior to lending and use that information to treat some consumers differently than others, for example, by charging them different prices or including different terms in contracts for them.[281]

Third, the Bureau is concerned that the Rule conflated the significance of a consumer's understanding of a company's business model with the consumer's understanding of that company's products or services. The Bureau stated that lenders' "business model—unbeknownst to borrowers—depends on repeated re-borrowing."[282] However, whether or not consumers understand the lender's revenue structure does not in itself determine whether they lack understanding about the features of the loan that they choose to take out. But the Bureau asserted that the two are connected, because lenders' business models are "directly inconsistent with the manner in which the product is marketed to consumers."[283] The Bureau nevertheless did not have evidence, for example, that consumers erroneously believe or are misinformed by lenders that loans are offered only to those consumers who have the ability to repay without reborrowing. The Bureau doubts that an inconsistency between a company's business model and

[281] As previously noted, due to similarities between the unfairness provisions in the Dodd-Frank Act and the FTC Act, FTC Act precedent informs the Bureau's understanding of unfairness under the Dodd-Frank Act. Although Dodd-Frank Act abusiveness authority is distinct, FTC Act precedent provides some factual examples that may help illustrate leveraging particular vulnerabilities of consumers. *See, e.g.,* FTC Policy Statement, *Int'l Harvester*, 104 F.T.C. at 1074 (unfair practices may include exercising "undue influence over highly susceptible classes of purchasers, as by promoting fraudulent 'cures' to seriously ill cancer patients"); *Ideal Toy*, 64 F.T.C. 297, 310 (1964) ("False, misleading and deceptive advertising claims beamed at children tend to exploit unfairly a consumer group unqualified by age or experience to anticipate or appreciate the possibility that representations may be exaggerated or untrue.").

[282] 82 FR 54472, 54621.

[283] *Id.* at 54623.

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. The Bureau noted that "covered short-term loans are marketed as being intended for short-term or emergency use,"[284] but that appears to be a statement about how most consumers use these loans, not a statement about the lenders' revenue structures.[285]

Fourth, on eliminating or sharply limiting feasible conditions that would reduce harm for a substantial portion of consumers, the Bureau questions whether a lender's decision not to offer such conditions constitutes unreasonable advantage-taking in this context. As discussed above with respect to atypicality, the Bureau does not believe that a lender's forgoing underwriting in this context necessarily indicates unreasonable advantage-taking.[286] Further, a lender's decision not to offer a short-term, non-amortizing product may be reasonable given that some States constrain the offering of longer-term products and, even if State law were not a constraint, longer-term, amortizing products would require lenders to assume credit risk over a longer period of time. The Bureau therefore now preliminarily does not believe this factor is of significant probative value concerning whether the identified practices takes unreasonable advantage of consumer vulnerabilities.

For these reasons, the Bureau preliminarily believes that it does not have a sufficient basis to find that lenders take unreasonable advantage of consumers under section 1031(d)(2) of

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[284] *Id.* at 54616.

[285] Moreover, to the extent that certain lenders are using particular language to mislead consumers regarding either the features of loans or the lenders' own revenue structures, it is not clear that this is related to a failure to make an ability-to-repay determination. Rather, that would appear to be a fact-specific problem that is already unlawful under the Dodd-Frank Act's prohibition on deceptive acts or practices. *See* 12 U.S.C. 5531(a).

[286] Further, the Bureau notes that this factor, which suggests that a lender takes unreasonable advantage by not assessing ability to repay because, *inter alia*, the lender does not underwrite, relies to a significant extent on circular logic. By presuming the unreasonable advantage-taking determination in this manner, the Bureau in the 2017 Final Rule neglected to offer a meaningful rationale for the weight that it placed on the failure to underwrite in the fourth factor of the analysis, and the Bureau preliminarily believes that it should not be given this weight.

the Dodd-Frank Act by making covered short-term loans or covered longer-term balloon-payment loans without reasonably assessing the consumer's ability to repay the loan according to its terms.

The Bureau seeks comment on this issue, including how the Bureau should interpret "taking unreasonable advantage" and the appropriate test for distinguishing between reasonable and unreasonable conduct under section 1031(d)(2) of the Dodd-Frank Act. The Bureau also seeks comment about the extent to which firms make loans for other consumer financial products without engaging in traditional underwriting, such as what a bank would do to underwrite an automobile loan or consumer finance lender would do for a small business loan.

5. Conclusion

Based on its analysis in parts V.C.1 through V.C.4 above, the Bureau preliminarily believes that the findings of an unfair and abusive practice as identified in § 1041.4 rested on applications of sections 1031(c) and (d) of the Dodd-Frank Act that the Bureau should no longer use. Specifically, the Bureau preliminarily concludes that the Bureau should no longer rely upon the 2017 Final Rule's: (1) application of the reasonable avoidability element of unfairness under section 1031(c)(1)(A) of the Dodd-Frank Act by finding that consumers could not reasonably avoid injury; (2) application of the countervailing benefits element under section 1031(c)(1)(B) of the Dodd-Frank Act and valuation of certain countervailing benefits under that section; (3) application of the lack of consumer understanding prong of abusiveness under section 1031(d)(2)(A) of the Dodd-Frank Act; and (4) application of the taking unreasonable advantage element of abusiveness under section 1031(d)(2) of the Dodd-Frank Act.

Based on these preliminary findings, the Bureau now proposes to rescind § 1041.4, which identifies the failure to conduct an ability-to-repay assessment in connection with making a covered short-term or longer-term balloon-payment loan as an unfair and abusive practice. The identification of an unfair and abusive practice as set out in § 1041.4 was predicated on certain factual findings established in the 2017 Final Rule as well as a particular application of section 1031(c) and (d) of the Dodd-Frank Act adopted in the 2017 Final Rule. The Bureau's preliminary conclusions here mean that neither factual nor legal grounds sustain the identification of an unfair and abusive practice as set out in § 1041.4.

The Bureau requests comment on these legal conclusions, the application and understanding of these specific provisions of section 1031(c) and (d) of the Dodd-Frank Act, and the application of the factual findings in part V.B above to these sections that would be pertinent to the Bureau's preliminary determination that there are no grounds to identify an unfair or abusive practice in § 1041.4, which identifies the failure to conduct an ability-to-repay analysis in connection with a covered short-term or longer-term balloon-payment loan as an unfair and abusive practice.

D. Consideration of Alternatives

The Bureau generally considers alternatives in its rulemakings. Here, the context for the consideration of alternatives is that the Bureau is proposing to rescind the Mandatory Underwriting Provisions of the 2017 Final Rule, which were based on the Bureau's discretionary authority, not a specific statutory directive.[287] The Bureau has preliminarily concluded as a matter of policy, as outlined in part V.B above, that a more robust and reliable evidentiary record is needed to support a rule that would have such dramatic impacts on the viability of payday lenders, competition among payday lenders, and the availability of payday loans to consumers

[287] 12 U.S.C. 5531(b) ("The Bureau *may* prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices.") (emphasis added).

who want one, and that the findings of an unfair or abusive practice as set out in § 1041.4 rested on applications of the relevant standards that the Bureau should no longer use, as detailed in part V.C.

In light of this posture, the Bureau does not believe that the alternative interventions to the Mandatory Underwriting Provisions considered in the 2017 Final Rule are viable alternatives to the Bureau's proposed rescission of the Mandatory Underwriting Provisions. For example, one alternative analyzed in the 2017 Final Rule was a payment-to-income test, offered in lieu of the specific underwriting criteria established by the Mandatory Underwriting Provisions. In this context, the payment-to-income test, limits on the number of loans in a sequence, and other alternatives that would rely on authority under section 1031 of the Dodd-Frank Act are not viable alternatives to rescission, because the Bureau is proposing to rescind the underlying findings concerning the existence of an unfair and abusive practice.[288]

The Bureau also does not believe that the expenditure of substantial Bureau resources on the development of possible alternative theories of unfair or abusive practices and corollary preventative remedies is warranted given the likely complexity of such an endeavor.

Additionally, the Bureau is not choosing to exercise its rulemaking discretion in order to pursue new disclosure requirements pursuant to section 1032 of the Dodd-Frank Act. As explained in the Bureau's preliminary findings set out in parts V.B and V.C above, there are indications that consumers potentially enter into these transactions with a general understanding of the risks entailed, including the risk of reborrowing. It is thus not clear to the Bureau at this time what purpose would be served by requiring disclosures as to the general risks of

[288] This includes, for instance, the payment-to-income alternative, the various State law regulatory approaches such as loan caps, and other interventions. *See* 82 FR 54472, 54636-40.

reborrowing be provided to these consumers. Further, as previously noted, a Bureau analysis of a study of State-mandated payday loan disclosures found that such disclosures had a limited impact on reducing payday loan use and, in particular, reborrowing, which suggests that consumers already have the information they deem relevant. Moreover, developing the evidentiary basis for disclosure requirements would be challenging and the development of disclosures would likely require the dedication of resources that does not seem warranted given the above factors and given the value of those resources if used to protect consumers through other Bureau activities, such as law enforcement. However, the Bureau does intend, in the normal course of its market monitoring activities, to continue to review whether consumers have the information they need to make informed decisions in the selection and use of short-term and balloon-payment loans.

The Bureau requests comment on its consideration of alternatives to the rescission of the Mandatory Underwriting Provisions, including its preliminary conclusion that the alternatives to the Mandatory Underwriting Provisions, as articulated in the 2017 Final Rule, are not viable alternatives to the rescission of the Mandatory Underwriting Provisions in light of the Bureau's factual and legal findings set forth in parts V.B and V.C above.

E. Conclusion

The Bureau believes that each of the concerns raised above are sufficiently serious in their own right to merit reconsideration of the 2017 Final Rule, and even more so when considered in combination. As described above, the Bureau believes that, in light of the 2017 Final Rule's dramatic market impacts, the studies on which it primarily relied in the Rule do not provide a sufficiently robust and reliable basis for finding that consumers cannot reasonably avoid injury or protect their interests, and do not understand the material risks, costs, and conditions of the loans. The Bureau also now preliminarily believes that the 2017 Final Rule used a problematic approach in applying section 1031 of the Dodd-Frank Act in determining what level of individualized understanding would be necessary to make the findings necessary to support a determination that the identified practice was unfair and abusive; in evaluating the countervailing benefits to consumers and to competition of the identified practice; and in evaluating whether the factors set forth in the 2017 Final Rule are the appropriate standard for taking unreasonable advantage of consumers and, if so, whether the Bureau properly applied that standard. The Bureau preliminarily concludes that it is appropriate to propose rescinding the Mandatory Underwriting Provisions of the 2017 Final Rule. After many years of rulemaking, outstanding questions that the Bureau and other stakeholders have on whether the identified practice is unlawful and whether the Bureau intervention (*i.e.*, the Mandatory Underwriting Provisions) is appropriate remain; the Bureau therefore preliminarily concludes that significantly more time, money, and other resources would be needed from the Bureau, industry, consumers, and other stakeholders to engage in the research and analysis required to develop specific evidence that might support determining that the identified practice is unfair and abusive and that imposing an ability-to-repay regulatory scheme is a necessary and appropriate response to that practice.

The Bureau seeks comment on these preliminary determinations that each of the concerns raised above (set out in parts V.B and V.C) are sufficiently serious in their own right to merit rescission of the Mandatory Underwriting Provisions.

Because the 2017 Final Rule's constellation of Mandatory Underwriting Provisions was premised on the existence of § 1041.4, which identified that the failure to conduct an ability-to-repay assessment constitutes an unfair and abusive practice,[289] the Bureau also preliminarily finds that rescinding § 1041.4 would also require rescinding the provisions setting forth the interventions that constitute the remedy for the practice because the Bureau only has legal authority to promulgate the Mandatory Underwriting Provisions where it has specifically identified an unfair or abusive act or practice.[290] The Bureau also seeks comment on rescission of the provisions in the 2017 Final Rule that were predicated on the unfair and abusive practice identified in § 1041.4. These include the mandatory underwriting requirements in § 1041.5,[291] a conditional exemption from those underwriting requirements in § 1041.6,[292] and related reporting and recordkeeping requirements in §§ 1041.10 through 1041.12.[293] The technical aspects of the proposal to rescind and additional, more specific questions with regard to the specific amendments to the 2017 Final Rule are discussed in more detail in part VI below.

Finally, the Bureau invites comments on any other issues or factors not specifically identified above that may nonetheless be relevant to its proposal to rescind the Mandatory Underwriting Provisions of the 2017 Final Rule.

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[289] *See* comment 4-1 (noting that lenders that comply with § 1041.6 in making covered short-term loans have not committed unfair and abusive practices under § 1041.4 and are not subject to § 1041.5).

[290] *See* 12 U.S.C. 5531(b) ("The Bureau may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices."); *see also id*. at 5531(c) (stating that "[t]he Bureau shall have no authority under this section to declare an act or practice . . . unlawful on the grounds that such act or practice is unfair" unless the act or practice meets the elements of unfairness); *id*. at 5531(d) (stating that "[t]he Bureau shall have no authority under this section to declare an act or practice abusive . . . unless the act or practice" meets one of two tests of abusiveness).

[291] 12 CFR 1041.5 (requiring that providers make a reasonable determination that the consumer would be able to make the payments on the loan and be able to meet the consumer's basic living expenses and other major financial obligations without needing to reborrow over the ensuing 30 days).

[292] 12 CFR 1041.6 (permitting providers, in lieu of following § 1041.5, to make a covered short-term loan without meeting all the specific underwriting criteria set out above, as long as the loan satisfies certain prescribed terms, the lender confirms that the consumer meets specified borrowing history conditions, and the lender provides required disclosures to the consumer).

[293] 12 CFR 1041.10 (requiring providers to furnish certain information); 12 CFR 1041.11 (establishing requirements for registered information systems); 12 CFR 1041.12 (requiring providers to establish and follow a compliance program and retain certain records).

VI. Section-by-Section Analysis

As described in greater detail in part V above, the Bureau is proposing to rescind §§ 1041.4 and 1041.5 of the 2017 Final Rule, which respectively identify the failure to reasonably determine whether consumers have the ability to repay certain covered loans as an unfair and abusive practice and establish certain underwriting requirements to prevent that practice. The Bureau is also proposing to rescind certain derivative provisions that are premised on these two core sections, including a conditional exemption for certain loans in § 1041.6, two provisions (§§ 1041.10 and 1041.11) that facilitate lenders' ability to obtain certain information about consumers' past borrowing history from information systems that have registered with the Bureau, and certain recordkeeping requirements in § 1041.12. The Bureau preliminarily concludes that, if §§ 1041.4 and 1041.5 are rescinded, these derivative provisions would no longer serve the purposes for which they were included in the 2017 Final Rule and should be rescinded as well.

This part VI describes the particular modifications the Bureau is proposing in order to effect the rescission of these various Mandatory Underwriting Provisions. Specifically, as discussed in more detail below, the Bureau is proposing to remove in their entirety the regulatory text and associated commentary for subpart B of the Rule (§§ 1041.4 through 1041.6) and certain provisions of subpart D (§§ 1041.10 and 1041.11, and parts of § 1041.12). The Bureau is also proposing modifications to other portions of regulatory text and commentary in the 2017 Final Rule that refer to the Mandatory Underwriting Provisions or the requirements therein.

As this part VI is describing the specific modifications to regulatory text and commentary that the Bureau is proposing, it refers to "removing" text rather than "rescinding" it, consistent with the language agencies use to instruct the Office of the Federal Register as to changes to be made in the *Code of Federal Regulations*.[294] In order to avoid confusion, the Bureau is not proposing to renumber the sections or paragraphs that it is not removing; rather, the Bureau is proposing that those section and paragraph numbers be marked as "[Reserved]" so that the remaining provisions would continue with the same numbering as they have currently.

Due to changes in requirements by the Office of the Federal Register, when amending commentary the Bureau is now required to reprint certain subsections being amended in their entirety rather than providing more targeted amendatory instructions. The sections of commentary included in this notice show the language of those sections if the Bureau adopts its changes as proposed. The Bureau is releasing an unofficial, informal redline to assist industry and other stakeholders in reviewing the changes that it is proposing to make to the regulatory text and commentary of the 2017 Final Rule.[295]

The Bureau seeks comment on the changes to the regulatory text and commentary that it is proposing in this part VI, and in particular whether any of the changes would affect implementation of the Payment Provisions. The Bureau also seeks comment on whether any other modifications not identified herein would be necessary to effect rescission of the Mandatory Underwriting Provisions as proposed.

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[294] As noted previously, while most of the 2017 Final Rule has a compliance date of August 19, 2019, the Rule became effective on January 16, 2018.

[295] This redline can be found on the Bureau's regulatory implementation page for the Rule at https://www.consumerfinance.gov/policy-compliance/guidance/payday-lending-rule/. If any conflicts exist between the redline and the text of the 2017 Final Rule or this NPRM, the documents published in the *Federal Register* are the controlling documents.

Subpart A—General

Section 1041.1 Authority and Purpose

1(b) Purpose

Section 1041.1 sets forth the Rule’s authority and purpose. The Bureau is proposing to remove the last sentence of § 1041.1(b), which currently provides that part 1041 also prescribes processes and criteria for registration of information systems. The Bureau is proposing this change for consistency with the proposed removal of §§ 1041.10 and 1041.11 discussed below.

Section 1041.2 Definitions

2(a) Definitions

2(a)(5) Consummation

Section 1041.2(a)(5) defines the term consummation. Comment (a)(5)-2 describes what types of loan modifications trigger underwriting requirements pursuant to § 1041.5. The Bureau is proposing to remove comment 2(a)(5)-1 for consistency with the proposed removal of § 1041.5 discussed below.

2(a)(14) Loan Sequence or Sequence

Section 1041.2(a)(14) defines the terms loan sequence and sequence to mean a series of consecutive or concurrent covered short-term loans, or covered longer-term balloon loans, or a combination thereof, in which each of the loans (other than the first loan) is made during the period in which the consumer has a covered short-term or longer-term balloon-payment loan outstanding and for 30 days thereafter. These terms are used in §§ 1041.5, 1041.6, and 1041.12(b)(3), and related commentary. The Bureau is proposing to remove and reserve § 1041.2(a)(14) for consistency with the proposed removal of the provisions in which these terms appear, as discussed below.

2(a)(19) Vehicle Security

Section 1041.2(a)(19) defines the term vehicle security to generally mean an interest in a consumer's motor vehicle obtained by the lender or service provider as a condition of the credit. This term is used in §§ 1041.6 and 1041.12(b)(3) and in commentary accompanying §§ 1041.5(a)(8) and 1041.6. The Bureau is proposing to remove and reserve § 1041.2(a)(19) for consistency with the proposed removal of the provisions in which this term appears, as discussed below.

The Bureau requests comment on whether there are any other definitional terms or portions thereof, in addition to the terms loan sequence or sequence and vehicle security, that it should similarly remove for consistency with the proposed rescission of the Mandatory Underwriting Provisions.

Section 1041.3 Scope of Coverage; Exclusions; Exemptions

3(e) Alternative Loan

Section 1041.3(e) provides a conditional exemption for alternative loans from the requirements of part 1041, which are covered loans that satisfy the conditions and requirements set forth in § 1041.3(e). The Bureau is proposing to revise two comments accompanying § 1041.3(e) that reference the Mandatory Underwriting Provisions, as described below.

3(e)(2) Borrowing History Condition

Section 1041.3(e)(2) addresses a consumer's borrowing history on other alternative loans. Comment 3(e)(2)-1 describes the relevant records a lender may use to determine that the consumer's borrowing history on alternative covered loans meets the criteria set forth in § 1041.3(e)(2). The Bureau is proposing to revise the second sentence of this comment to remove language that refers to consumer reports obtained from information systems registered with the Bureau. The Bureau is proposing this change for consistency with the proposed removal of § 1041.11 discussed below.

3(e)(3) Income Documentation Condition

Section 1041.3(e)(2) requires a lender to maintain and comply with policies and procedures for documenting proof of recurring income. Comment 3(e)(3)-1 generally describes the income documentation policies and procedures that a lender must maintain to satisfy the income documentation condition of the conditional exemption. The Bureau is proposing to remove the second sentence of the comment, which distinguishes the income document condition of § 1041.3(e)(3) from the income documentation procedures required by § 1041.5(c)(2). The Bureau is proposing to revise this comment for consistency with the proposed removal of § 1041.5 discussed below.

Subpart B—Underwriting

Subpart B sets forth the rule's underwriting requirements in §§ 1041.4 through 1041.6. The Bureau is proposing to remove and reserve the heading for subpart B; the removal of its contents is discussed below.

Section 1041.4 Identification of Unfair and Abusive Practice

Section 1041.4 provides that it is an unfair and abusive practice for a lender to make covered short-term or longer-term balloon-payment loans without reasonably determining that the consumers will have the ability to repay the loans according to their terms. For the reasons set forth above, the Bureau is proposing to remove and reserve § 1041.4 and to remove the commentary accompanying § 1041.4.

Section 1041.5 Ability-to-Repay Determination Required

Section 1041.5 generally requires a lender to make a reasonable determination that a consumer has the ability to repay a covered short-term or a longer-term balloon-payment loan before making such a loan or increasing the credit available under such a loan. It also sets forth certain minimum requirements for how a lender may reasonably determine that a consumer has the ability to repay such a loan. For the reasons set forth above, the Bureau is proposing to remove and reserve § 1041.5 and to remove the commentary accompanying § 1041.5.

Section 1041.6 Conditional Exemption for Certain Covered Short-Term Loans

Section 1041.6 provides a conditional exemption for covered short-term loans that satisfy requirements set forth in § 1041.6(b) through (e); §§ 1041.4 and 1041.5 do not apply to such conditionally exempt loans. For the reasons set forth above and for consistency with the proposed removal of §§ 1041.4 and 1041.5, the Bureau is proposing to remove and reserve § 1041.6 and to remove the commentary accompanying § 1041.6.

Subpart D—Information Furnishing, Recordkeeping, Anti-Evasion, and Severability

Subpart D contains the rule's requirements regarding information furnishing (§ 1041.10), registered information systems (§ 1041.11), and compliance programs and record retention (§ 1041.12); sets forth a prohibition against evasion (§ 1041.13); and addresses severability (§ 1041.14). The Bureau is proposing to remove the portion of the subpart's heading that refers to information furnishing for consistency with the proposed removal of §§ 1041.10 and 1041.11. Specific revisions to this subpart's contents are discussed below.

Section 1041.10 Information Furnishing Requirements

Among other things §§ 1041.5 and 1041.6, discussed above, require lenders when making covered short-term and longer-term balloon-payment loans to obtain consumer reports from information systems registered with the Bureau pursuant § 1041.11. Section 1041.10, in turn, requires lenders to furnish certain information about each covered short-term and longer-term balloon-payment loan to each registered information system. For the reasons set forth above and for consistency with the other changes proposed herein, the Bureau is proposing to remove and reserve § 1041.10 and to remove the commentary accompanying § 1041.10.

Section 1041.11 Registered Information Systems

Section 1041.11 sets forth processes for information systems to register with the Bureau, describes the conditions that an entity must satisfy in order to become a registered information system, addresses notices of material change, suspension and revocation of a registration, and administrative appeals. For the reasons set forth above and for consistency with the other changes proposed herein, the Bureau is proposing to remove and reserve § 1041.11 and to remove the commentary accompanying § 1041.11.

Section 1041.12 Compliance Program and Record Retention

12(a) Compliance Program

Section 1041.12 provides that a lender making a covered loan must develop and follow written policies and procedures that are reasonably designed to ensure compliance with the requirements of part 1041. Comment 12(a)-1, in part, lists the various sections of the rule that must be addressed in the compliance program. The Bureau is proposing to remove from that comment the references to the ability-to-repay requirements in § 1041.5, the alternative requirements in § 1041.6, and the requirements on furnishing loan information to registered and preliminarily registered information systems in § 1041.10.

Comment 12(a)-2 explains that the written policies and procedures a lender must develop and follow under § 1041.12(a) depend on the types of covered loans that the lender makes, and provides certain examples. The Bureau is proposing to remove this comment as its examples are largely focused on compliance with §§ 1041.5, 1041.6, and 1041.10. The Bureau does not believe that it is useful to retain the remaining portion of this comment focusing solely on disclosures related to § 1041.9, although of course it remains true pursuant to § 1041.12(a) itself that a lender that makes a covered loan subject to the requirements of § 1041.9 must develop and follow written policies and procedures to provide the required disclosures to consumers.

The Bureau is proposing to make these changes for consistency with the proposed removal of §§ 1041.5, 1041.6, and 1041.10 discussed above.

12(b) Record Retention

Section 1041.12(b) provides that a lender must retain evidence of compliance with part 1041 for 36 months after the date on which a covered loan ceases to be an outstanding loan. Section 1041.12(b)(1) through (4) sets forth particular requirements for retaining specific records, including retention of the loan agreement and documentation obtained in connection with originating a covered short-term or longer-term balloon-payment loan (§ 1041.12(b)(1)); retention of electronic records in tabular format for covered short-term or longer-term balloon-payment loans regarding origination calculations and determinations under § 1041.5 ((§ 1041.12(b)(2)) and as well as type, terms, and performance (§ 1041.12(b)(3)); and retention of records relating to payment practices for covered loans (§ 1041.12(b)(4)). Proposed revisions to the regulatory text of § 1041.12(b)(1) through (3), and related commentary, are discussed in turn further below.

Comment 12(b)-1 addresses record retention requirements generally. The Bureau is proposing to remove the portion of this comment explaining that a lender is required to retain various categories of documentation and information specifically in connection with the underwriting and performance of covered short-term and longer-term balloon-payment loans, while retaining (with minor revisions for clarity) the reference to records concerning payment practices in connection with covered loans. The comment also explains that the items listed in § 1041.12(b) are non-exhaustive as to the records that may need to be retained as evidence of compliance with part 1041. The Bureau is proposing to remove the remainder of this sentence, which specifically refers to loan origination and underwriting, terms and performance, and payment practices (the specific mention of which is no longer necessary if the other references are removed). The Bureau is proposing these changes for consistency with the proposed removal of §§ 1041.4 through 1041.6 discussed above as well as the proposed changes to § 1041.12(b)(1) discussed below.

12(b)(1) Retention of Loan Agreement and Documentation Obtained in Connection with Originating a Covered Short-Term or Covered Longer-Term Balloon-Payment Loan

Section 1041.12(b)(1) requires that, in order to comply with the requirements in § 1041.12(b), a lender must retain or be able to reproduce an image of the loan agreement and certain documentation obtained in connection with the origination of a covered short-term or longer-term balloon-payment loan. The Bureau is proposing to remove the language in the heading and in the introductory text for § 1041.12(b)(1) that refers to the certain documentation obtained in connection with a covered short-term or longer-term balloon-payment loan, as well as the entirety of § 1041.12(b)(1)(i) through (iii) that specifies particular categories of such documentation. As proposed, the remainder of this provision would require a lender to retain or be able to reproduce an image of the loan agreement for each covered loan. Retaining a copy of the loan agreement is necessary for all lenders, pursuant to the requirement in § 1041.12(b) that lenders retain evidence of compliance for covered loans, in order to determine covered loan status for purposes of determining compliance with the Payment Provisions; the Bureau is proposing to explicitly retain this requirement in § 1041.12(b)(1), for all covered loans, to avoid potential confusion. The Bureau is also proposing to remove the commentary accompanying § 1041.12(b)(1). The Bureau is proposing these changes for consistency with the other changes proposed herein.

12(b)(2) Electronic Records in Tabular Format Regarding Origination Calculations and Determinations for a Covered Short-Term or Covered Longer-Term Balloon-Payment Loan under § 1041.5

Section 1041.12(b)(2) requires lenders to retain records regarding origination calculations and determinations for a covered short-term or longer-term balloon-payment loan, including specific required information listed in § 1041.12(b)(2)(i) through (v). It requires lenders to retain these records in an electronic, tabular format. For consistency with the proposed removal of § 1041.5, the Bureau is proposing to remove and reserve § 1041.12(b)(2) and to remove the commentary accompanying § 1041.12(b)(2).

12(b)(3) Electronic Records in Tabular Format Regarding Type, Terms, and Performance for Covered Short-Term or Covered Longer-Term Balloon-Payment Loans

Section 1041.12(b)(3) requires lenders to retain records regarding the type, terms, and performance of a covered short-term or longer-term balloon-payment loan, including specific required information listed in § 1041.12(b)(3)(i) through (vii). It requires lenders to retain these records in an electronic, tabular format. The Bureau is proposing to remove and reserve § 1041.12(b)(3) and to remove the commentary accompanying § 1041.12(b)(3), for consistency with the proposed removal of §§ 1041.5 and 1041.6 discussed above.

12(b)(5) Electronic Records in Tabular Format Regarding Payment Practices for Covered Loans

Section 1041.12(b)(5) requires lenders to retain records regarding the payment practices for covered loans, including specific required information listed in § 1041.12(b)(5)(i) and (ii). It requires lenders to retain these records in an electronic, tabular format. For consistency with the other changes proposed herein, the Bureau is proposing to revise comment 12(b)(5)-1 by removing most of its content, which focuses on compliance with § 1041.12(b)(2) and (3) in conjunction with § 1041.12(b)(5), and in its place the Bureau is proposing to incorporate the description of how a lender complies with the requirement to retain records in a tabular format, which is currently set forth in comment 12(b)(2)-1. The Bureau is also proposing to revise comment 12(b)(3)-1 to reflect the proposed change to § 1041.12(b)(3) and to incorporate the description of how a lender complies with the requirement to retain records in a tabular format. This description is currently included in comment 12(b)(2)-1. The Bureau is also proposing to remove the cross-reference to § 1041.12(b)(2) in the description of how records must be retained, and to remove the final sentence of the commentary discussing association of records under § 1041.12(b)(5) with unique loan and consumer identifiers in § 1041.12(b)(3) as the Bureau is proposing to remove those recordkeeping requirements from § 1041.12(b)(3).

Appendix A to Part 1041—Model Forms

A-1 Model Form for First § 1041.6 Loan

Section 1041.6(e)(2)(i) requires a lender that makes a first loan in sequence of loans under the conditional exemption in § 1041.6 to provide a consumer with a notice that includes certain information and statements, using language that is substantially similar to the language set forth in Model Form A-1. For the reasons sets forth above and for consistency with the proposed removal of § 1041.6, the Bureau is proposing to remove and reserve Model Form A-1.

A-2 Model Form for Third § 1041.6 Loan

Section 1041.6(e)(2)(ii) requires a lender that makes a third loan in sequence of loans under the conditional exemption in § 1041.6 to provide a consumer with a notice that includes certain information and statements, using language that is substantially similar to the language set forth in Model Form A-2. For the reasons sets forth above and for consistency with the proposed removal of § 1041.6, the Bureau is proposing to remove and reserve Model Form A-2.

VII. Compliance and Effective Dates

The Bureau is proposing that this rule take effect 60 days after publication in the *Federal Register*.[296] As discussed above, the current compliance date for the Mandatory Underwriting Provisions of the 2017 Final Rule is August 19, 2019, which the Bureau has separately proposed elsewhere in today's *Federal Register* to delay by 15 months, to November 19, 2020. After considering comments received on that proposal, the Bureau intends to publish a final rule with respect to the compliance date for the Mandatory Underwriting Provisions of the 2017 Final Rule. Likewise, after considering comments received on this proposal, the Bureau expects to publish a final rule with respect to the Mandatory Underwriting Provisions themselves. The Bureau seeks comment on this aspect of the proposal.

[296] Section 553(d) of the APA generally requires that the effective date of a final rule be at least 30 days after publication of that final rule, except for (1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretive rules or statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule. 5 U.S.C. 553(d). If finalized, this proposal would not establish any requirements; instead, it would rescind the relevant provisions of the 2017 Final Rule. Accordingly, if finalized this proposal would be a substantive rule which relieves a restriction that is exempt from section 553(d) of the APA.

VIII. Dodd-Frank Act Section 1022(b)(2) Analysis

A. Overview

In developing this proposal, the Bureau has considered the potential benefits, costs, and impacts as required by section 1022(b)(2)(A) of the Dodd-Frank Act.[297] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services, the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act, and the impact on consumers in rural areas.

In advance of issuing this proposal, the Bureau has consulted with the prudential regulators and the Federal Trade Commission, including consultation regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

1. The Need for Federal Regulatory Action

As explained above, the Bureau now preliminarily believes that, in light of the 2017 Final Rule's dramatic market impacts as detailed in the section 1022(b)(2) analysis accompanying the 2017 Final Rule, its evidence is insufficient to support the findings that are necessary to conclude that the identified practices were unfair and abusive. The Bureau also now preliminarily believes that the finding of an unfair and abusive practice as identified in § 1041.4 of the 2017 Final Rule rested on applications of sections 1031(c) and (d) of the Dodd-Frank Act that the Bureau should no longer use. The Bureau therefore is proposing to rescind the Mandatory Underwriting Provisions of the 2017 Final Rule because it preliminarily believes the facts and the law do not

[297] 12 U.S.C. 5512(b)(2)(A).

adequately support the conclusion that the identified practice meets the standard for unfairness or abusiveness under section 1031(c) and (d) of the Dodd-Frank Act.[298]

2. Data and Evidence

In the section 1022(b)(2) analysis that accompanied the 2017 Final Rule, the Bureau endeavored to consider comprehensively the economic benefits and costs that were likely to result from that Rule. These benefits and costs included direct pecuniary impacts, as well as non-pecuniary impacts that the available evidence indicated were likely to result from the Rule, if the proposal were to be adopted. The Bureau relied on the then-available evidence to analyze the potential benefits, costs, and impacts of the Rule.

In this section 1022(b)(2) analysis, the Bureau endeavors to consider comprehensively the economic benefits and costs that are likely to result from the proposal to rescind the Mandatory Underwriting Provisions of the 2017 Final Rule, possibly including some indirect effects.[299]

Since the issuance of the 2017 Final Rule, the body of evidence bearing on benefits and costs has only slightly expanded. As such, with the exception of the new studies discussed below, the Bureau has considered the same information as it considered in the section 1022(b)(2) analysis of the 2017 Final Rule, although as discussed in part V.B, the Bureau has altered its conclusion as to the weight to be accorded to the key evidence in finding an unfair and abusive act or practice as well as warranting regulatory intervention.[300] The new research that has

[298] The 2017 Final Rule stated that the existence of a market failure supported the need for Federal regulatory action. As the Bureau now believes that there is not a need for the Federal regulatory action described in the 2017 Final Rule, it is not necessary for the Bureau here in the section 1022(b)(2) analysis to identify or address a market failure.

[299] Note that, in considering these "second-order" impacts, the Bureau focuses on those effects where research has established a plausible, causal link between the intervention and the benefits or costs.

[300] The same evidence may be evaluated differently for purposes of legal and economic analysis.

become available after the drafting of the 2017 Final Rule have relatively little impact on the Bureau's analysis compared to the evidence cited in the 2017 Final Rule, as the implications of this new evidence for total surplus and consumer welfare are less clear or probative than those of the previously considered evidence.

The Bureau invites submission of additional data and studies that can supplement those relied on in the 2017 Final Rule's analysis which form the predicate for the estimates here as well as comments on the analyses of benefits and costs contained in that Rule and relied on here. Specifically, in some instances the data to perform quantitative analyses of particular issues or effects are not available, or are quite limited, and submissions that would augment the current analysis are especially welcome. Absent these data, portions of the analysis to follow rely, at least in part, on qualitative evidence provided to the Bureau in previous comments, responses to RFIs, and academic papers; general economic principles; and the Bureau's experience and expertise in consumer financial markets. As such, many of the benefits, costs, and impacts in this proposal are presented in general terms or ranges (as they were in the section 1022(b)(2) analysis of the 2017 Final Rule), rather than as point estimates.

The Bureau also requests comment on potential alternatives.

3. Major Provisions and Coverage of the Proposed Rule

In this analysis, the Bureau focuses on the benefits, costs, and impacts of the three major elements of the proposal: (1) the revocation of the 2017 Final Rule's requirement to reasonably determine borrowers' ability to repay covered short-term and longer-term balloon-payment loans according to their terms (along with the conditional exemption allowing for a principal step-down approach to issuing a limited number of short-term loans); (2) the revocation of the recordkeeping requirements associated with (1); and (3) the revocation of the 2017 Final Rule's requirements concerning furnishing provisions and their associated requirements for registered information systems.

In the 2017 Final Rule, the Bureau delineated two major classes of short-term lenders it expected to be affected by the Mandatory Underwriting Provisions: payday/unsecured short-term lenders, both storefront and online, and short-term vehicle title lenders.[301] The Bureau also noted that at least one bank that was offering a deposit advance product was likely to be affected by the Rule's provisions.[302] Similarly, any depository institution that might have considered offering a deposit advance product was likely to be affected by the Rule's provisions.[303] The Bureau also recognized that some community banks and credit unions occasionally make short-term secured or unsecured loans, but noted the Bureau believed that those loans generally fall within the conditional exemption for alternative loans or the conditional exemption for accommodation loans under § 1041.3(e) and (f), respectively.[304] Similarly, the Bureau recognized that some firms in the financial technology space are seeking to offer products designed to enable

[301] 82 FR 54472, 54814.

[302] *Id.*

[303] *Id.* at 54815. Notably, on October 5, 2017, the Office of the Comptroller of the Currency (OCC) rescinded guidance that had limited the provision of deposit advance products. 82 FR 47602 (Oct. 12, 2017); *see also* News Release, Office of the Comptroller of the Currency, *Acting Comptroller of the Currency Rescinds Deposit Advance Product Guidance* (NR-2017-118, Oct. 5, 2017), https://www.occ.treas.gov/news-issuances/news-releases/2017/nr-occ-2017-118.html. A May 23, 2018 OCC bulletin goes farther, and encourages banks to offer responsible short-term, small-dollar installment loans, which would likely compete with the loans covered by this proposal. Bulletin, Office of the Comptroller of the Currency, *Core Lending Principles for Short-Term, Small-Dollar Installment Lending,* (OCC Bulletin 2018-14, May 23, 2018), https://www.occ.treas.gov/news-issuances/bulletins/2018/bulletin-2018-14.html. Additionally, on November 14, 2018, the FDIC issued an RFI seeking public comment on consumer demand for small-dollar credit products, the supply of small-dollar credit products currently offered by banks, and whether there are steps the FDIC could take to better enable banks to provide such products to consumers to meet demand. 83 FR 58566, 58567 (Nov. 20, 2018); *see also* Fed. Deposit Ins. Corp., Financial Institution Letter, *Request for Information on Small-Dollar Lending* (FIL-71-2018, Nov. 14, 2018), https://www.fdic.gov/news/news/financial/2018/fil18071.pdf. Given these changes, it is likely that these firms will more seriously consider offering these products under this proposal.

[304] 82 FR 54472, 54815.

consumers to better cope with liquidity shortfalls, but the Bureau believed that those products, to a significant extent, fall within the exclusion for wage advance programs under § 1041.3(d)(7) or the exclusion for no-cost advances under § 1041.3(d)(8).[305]

In addition to short-term lenders, lenders making longer-term balloon-payment loans (either vehicle title or unsecured) are also covered by the Rule's requirements concerning underwriting and RISes. It follows that lenders of each of these types will experience effects much like those of short-term lenders by the proposed revocation of the mandatory underwriting and RIS requirements.

The proposal's revocation of mandatory underwriting and RIS requirements carries implications relating to recordkeeping requirements that apply to any lender making covered short-term or longer-term balloon-payment loans. The proposed revocation of the RIS provisions relates to the application process and operational requirements for entities who otherwise would have sought to become RISes.[306]

4. Description of the Baseline

The major impact of the proposal on which the Bureau is seeking public comment would be to eliminate the Federal regulations requiring underwriting of covered short-term and longer-term balloon-payment loans. No lenders are required to comply with the 2017 Final Rule until the compliance date (which currently is August 19, 2019) and until the court in litigation challenging the 2017 Final Rule lifts its stay of the compliance date. Accordingly, if the Bureau makes its proposal final before lenders have to comply with the Mandatory Underwriting

[305] *Id.* The Bureau also believes many current fintech offerings fall outside of at least the mandatory underwriting requirements of the Rule, as they often focus on longer-term lending without balloon payments.

[306] In this part, the Bureau's references to RISes generally include firms in any stage of becoming an RIS, whether they would have been preliminarily approved, provisionally registered, or would have completed the process at the time this proposal would, if adopted, go into effect.

Provisions in the 2017 Final Rule, then no lenders will have had to comply with them. As a practical matter, issuing regulatory requirements and revoking them before covered entities have had to actually comply with them means there is little effect on stakeholders from the combined effect of issuing and revoking the requirements, that is, the combined effect is returning to the status quo prior to the agency issuing a final rule.

Nevertheless, the Bureau is considering the agency's two regulatory actions (that is issuing the 2017 Final Rule and proposing to rescind the Mandatory Underwriting Provisions of the 2017 Final Rule prior to its compliance date) separately for section 1022(b)(2) analysis purposes. The issuance was evaluated in a section 1022(b)(2) analysis when the Bureau issued the 2017 Final Rule. The proposed revocation is evaluated in this section 1022(b)(2) analysis.

In considering the potential benefits, costs, and impacts of the proposal to rescind the Mandatory Underwriting Provisions in the 2017 Final Rule, to provide the most comprehensive assessment of the impact that the proposal would have, the Bureau takes as a baseline a scenario in which compliance with the 2017 Final Rule would become mandatory as of August 19, 2019 and compares the effect of the proposal to the market that would exist if, before reaching the compliance date, the Bureau elects to issue a final rule rescinding the Mandatory Underwriting Provisions of the 2017 Final Rule.

In other words, the Bureau takes the 2017 Final Rule as the baseline, and considers economic attributes of the relevant markets as they were (and continue to be) projected to exist under the 2017 Final Rule and the existing legal and regulatory structures (*i.e.,* those that have been adopted or enacted, even if compliance is not yet required) applicable to providers.[307] This

[307] The Bureau has discretion in each rulemaking to choose the relevant provisions to discuss and to choose the most appropriate baseline for that particular rulemaking in its analysis under section 1022(b)(2)(A) of the Dodd-Frank Act.

approach assumes that any actions already undertaken and those that will be necessary to take in anticipation of the compliance date would also be reversed following revocation; it is the Bureau's belief that this is a reasonable assumption but seeks comment on any such changes.[308]

As noted above, the Bureau has considered the same information as it considered in the section 1022(b)(2) analysis of the 2017 Final Rule and has chosen not to revisit the specific methodologies in that analysis. As such, the expected impacts articulated in those analyses are taken as features of the baseline in this analysis. The Bureau welcomes comments on this approach.

The baseline specifically recognizes the wide variation in State-level restrictions that currently exist. As described in greater detail in the 2017 Final Rule, there were at that time 35 (now 33) States that either have created a carve-out from their general usury cap for payday loans or have no usury caps on consumer loans.[309] The remaining 15 (now 17) States and the

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[308] The Bureau also notes that compliance readiness is ongoing, and lenders may or may not continue to incur costs in anticipation of needing to comply unless and until uncertainty around the Mandatory Underwriting Provisions is resolved.

[309] For a list of States, see Pew Charitable Trusts, *State Payday Loan Regulation and Usage Rates* (Jan. 14, 2014), http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/state-payday-loan-regulation-and-usage-rates. Other reports reach slightly different totals of payday authorizing States depending on their categorization methodology. *See, e.g.*, Susanna Montezemolo, *The State of Lending in America & Its Impact on U.S. Households: Payday Lending Abuses and Predatory Practices*, at 32-33 (Ctr. for Responsible Lending, 2013), http://www.responsiblelending.org/sites/default/files/uploads/10-payday-loans.pdf; Consumer Fed'n of Am., *Legal Status of Payday Loans by State*, http://www.paydayloaninfo.org/state-information (last visited Feb. 4, 2019) (listing 32 States as having authorized or allowed payday lending). Since publication of these reports, South Dakota enacted a 36 percent usury cap for consumer loans. Press Release, S.D. Dep't of Labor and Reg., *Initiated Measure 21 Approved* (Nov. 10, 2016), http://dlr.sd.gov/news/releases16/nr111016_initiated_measure_21.pdf.

Legislation in New Mexico prohibiting short-term payday and vehicle title loans went into effect on January 1, 2018. Regulatory Alert, N.M. Reg. and Licensing Dep't, *Small Loan Reforms*, http://www.rld.state.nm.us/uploads/files/HB%20347%20Alert%20Final.pdf. Legislation passed in Ohio placing significant restrictions on short-term loans with an effective date of October 29, 2018. Ohio 132nd General Assembly House Bill 123, *Modify short-term, small, and mortgage loan laws*, https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-hb-123. On February 1, 2019, a ballot initiative approved by voters in November 2018 will go into effect as law in Colorado reducing APRs on payday loans to 36 percent. *See* Colo. Legislative Council Staff, *Initiative #126 Initial Fiscal Impact Statement*, https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2017-2018/

District of Columbia either ban payday loans or have fee or interest rate caps that payday lenders apparently find too low to sustain their business models. Except as described below, this proposal would have minimal impact on covered persons in these States, and State law would still be binding on the markets in these areas. Further variation exists across the States that allow payday loans, as States vary in their payday loan size limits and their restrictions related to rollovers (*e.g.,* when they are permitted and whether they are subject to certain limitations, such as a cap on the number of rollovers or requirements that the borrower amortize—*i.e.,* repay part of the original loan amount—on the rollover). Numerous cities and counties within these States have also passed local ordinances restricting the location, number, or product features of payday lenders.[310] Restrictions on vehicle title lending similarly vary across and within States, in a manner that often (but not always) overlaps with payday lending restrictions. Overall, these restrictions result in fewer than half of States allowing single-payment vehicle title loans that are covered by the Mandatory Underwriting Provisions of the 2017 Final Rule.[311]

Another notable feature of the baseline is the restriction in the Military Lending Act (MLA) to address concerns about the extension of high-cost credit to servicemembers.[312] The MLA, as implemented by the Department of Defense, requires, among other things, that the

126FiscalImpact.pdf; *see also* Colo. Sec'y of State, *Official Certified Results—State Offices & Questions,* https://results.enr.clarityelections.com/CO/91808/Web02-state.220747/#/c/C_2 (Proposition 111).

[310] For a sample list of local payday ordinances and resolutions, see Consumer Fed'n of Am., *Controlling the Growth of Payday Lending Through Local Ordinances and Resolutions* (Oct. 2012), www.consumerfed.org/pdfs/Resources.PDL.LocalOrdinanceManual11.13.12.pdf; *see also, e.g.*, Portland Or., Code § 7.26.050; Eugene Or., Code § 3.556; Tex. Mun. League, *City Regulation of Payday and Auto Title Lenders*, http://www.tml.org/payday-updates.

[311] For a discussion of State vehicle title lending restrictions, see Consumer Fed'n of Am., *Car Title Loan Regulation* (Nov. 16, 2016), http://consumerfed.org/wp-content/uploads/2017/01/11-16-16-Car-Title-Loan-Regulation_Chart.pdf.

[312] The MLA Act, part of the John Warner National Defense Authorization Act for Fiscal Year 2007, was signed into law in October 2006. The interest rate cap took effect October 1, 2007. *See* 10 U.S.C. 987.

creditor may not impose a military annual percentage rate (MAPR) greater than 36 percent in connection with an extension of consumer credit to a covered borrower. In 2007, the Department of Defense issued its initial regulation under the MLA, limiting the Act's application to closed-end loans with a term of 91 days or less in which the amount financed did not exceed $2,000, closed-end vehicle title loans with a term of 181 days or less, and closed-end tax refund anticipation loans.[313] This covered most short-term and longer-term payday and vehicle title loans. These regulations remain in effect and affect the terms of loans available to servicemembers.[314]

In considering the benefits, costs, and impacts of the proposal, the Bureau uses this baseline. More specifically, the Bureau notes that the 2017 Final Rule and this proposal would have limited impacts, with some limited exceptions, for consumers in States that currently do not allow such lending or that impose usury limits that have led payday and vehicle title lenders to refrain from doing business in those States, or for consumers who are not eligible for such lending.[315] It is possible that consumers in these States access such loans online, by crossing State lines, or through other means. To the extent the 2017 Final Rule would limit such lending, this proposal may impact these consumers. Similarly, in States which regulate payday lending in

[313] 72 FR 50580 (Aug. 31, 2007).

[314] As noted in the 2017 Final Rule, effective October 2015 the Department of Defense expanded its definition of covered credit to include open-end credit and longer-term loans so that the MLA protections generally apply to all credit subject to the requirements of Regulation Z (12 CFR part 1026), which implements the Truth in Lending Act, other than certain products excluded by statute. 80 FR 43560 (July 22, 2015) (codified at 32 CFR part 232).

[315] The 2017 Final Rule would affect such consumers to the extent that they would otherwise cross State lines to obtain a covered short-term or longer-term balloon-payment loan or borrow from an unlicensed lender. Evidence of consumers crossing State borders to obtain loans suggests these consumers overwhelmingly reside near a border with a State that allows such lending (see Onyumbe Enumbe Lukongo & Thomas W. Miller, *Adverse Consequences of the Binding Constitutional Interest Rate Cap in the State of Arkansas* (Mercatus Working Paper 2017), https://www.mercatus.org/system/files/lukongo_wp_mercatus_v1.pdf for one example). As such, the potential impacts on consumers residing in payday restricting States is likely concentrated in those consumers near a border who are willing and able to cross to obtain a payday loan.

ways that prevent or limit the volume of loans extended, the 2017 Final Rule and the proposal would have fewer impacts on consumers and covered persons, as the State laws may already restrict lending. The overall effects of these more restrictive State laws were described in the 2017 Final Rule and earlier in this proposal. In the remaining States—those that allow lending covered by the 2017 Final Rule without any binding limitations—the proposal would have its most substantial impacts relative to the 2017 Final Rule baseline.

Notably, the quantitative simulations set forth in the 2017 Final Rule and summarized below reflect these variations in the baseline across States and across consumers with one exception. The data used for the 2017 Final Rule's analysis inherently capture the nature of shocks to, and mismatches in the timing between, consumers' income and payments that drive much of the demand for covered short-term and longer-term balloon-payment loans.[316] To the extent that these shocks and mismatches have not changed since the time periods covered by the data (2011-2012), they are captured in the simulations. The analysis is also based on the statutory and regulatory environment extant when the data were compiled. The implication is that to the extent that the environment absent the 2017 Final Rule has changed in the intervening years, those changes are not reflected in the simulations. More specifically, the simulations will overstate the proposal's effects on lending volume in those areas where other regulatory changes since that time have limited lending. The simulations also will underestimate the proposal's effects on lending volume in any areas where regulatory changes since that time have relaxed restrictions on lending. In general, the Bureau believes that the States have become more

[316] The Bureau believes that obtaining additional data to update its estimates would not be a cost-effective enterprise. As noted in text, these results are largely consistent with estimates offered in industry comments on the 2016 Proposal, which provides additional validation that that the available evidence upon which this analysis relies is reliable for these purposes.

restrictive over the past seven years, so that in this respect the simulations here are more likely to overstate than understate the effects of the proposal.[317] That said, the simulation results are generally consistent with the additional estimates, using other data and time periods, provided to the Bureau in industry and alternative credit bureau comments on the 2016 Proposal.

5. Major Impacts of the Proposal

The primary impact of this proposed rule relative to the baseline in which compliance with the Mandatory Underwriting Provisions of the 2017 Final Rule becomes mandatory would be a substantial increase in the volume of short-term payday and vehicle title loans (measured in both number and total dollar value), and a corresponding increase in the revenues lenders realize from these loans. The simulations set forth in the section 1022(b)(2) analysis accompanying the 2017 Final Rule based on the Bureau's data indicate that relative to the chosen baseline payday loan volumes would increase by 104 percent to 108 percent, with an increase in revenue for payday lenders between 204 percent and 213 percent.[318] Simulations of the impact on short-term vehicle title lending predict an increase in loan volumes of 809 percent to 1,329 percent relative to the chosen baseline, with an approximately equivalent increase in revenues. The specific details, assumptions, and structure of these simulations are described in the 2017 Final Rule.[319]

[317] Another possible change that could affect the baseline is the June 2018 Community Financial Services of America (a trade association representing payday and small-dollar lenders) revision of its best practices to add that its members should, before extending credit, "undertake a reasonable, good-faith effort to determine a customer's creditworthiness and ability to repay the loan." This practice applies to other small-dollar loans the member makes. *See* Cmty. Fin. Serv. of Am., *Best Practices for the Small-Dollar Loan Industry*, https://www.cfsaa.com/files/files/CFSA-BestPractices.pdf (last visited Feb. 4, 2019).

[318] These calculations are based on the same simulations the Bureau described in the 2017 Final Rule. The Bureau ran a number of simulations based on different market structures that may occur as a result of the Rule. The estimates cited here come from the specifications where lenders would make loans under both the mandatory underwriting and principal step-down approaches. See the 2017 Final Rule for descriptions of all the simulations conducted by the Bureau, and their results. 82 FR 54472, 54824.

[319] The numbers cited here are simply the reverse of the numbers cited in the 2017 Final Rule as being the most likely. There, the Bureau estimated a decrease in loan volumes of 51 to 52 percent and a decrease in revenues of 67

The Bureau expects, again relative to the chosen baseline, that these increases would result in an increase in the number of storefronts relative to the market projected to exist under the 2017 Final Rule. As discussed in the section 1022(b)(2) analysis for the 2017 Final Rule, a decrease in payday storefronts was observed in States that experienced loan volume declines of the magnitude projected to occur for payday loans under the 2017 Final Rule after those States adopted restrictive regulations (*e.g.,* Washington),[320] making a corresponding relative increase likely if the Mandatory Underwriting Provisions are rescinded. This might in turn improve physical access to credit for consumers, especially for consumers in rural areas. Additionally, the increase in storefronts would be likely to impact small lenders and lenders in rural areas more than larger lenders and those in areas of greater population density. However, the practical improvements in consumer physical access to payday loans are not likely to be as substantial as the increase in storefronts may imply. Again as explained in the 2017 Final Rule, in States with substantial regulatory changes that led to substantial decreases in payday storefronts, over 90 percent of borrowers had to travel an additional five miles or less. Additionally, the Bureau anticipated in the 2017 Final Rule that online options would be available to the vast majority of current payday borrowers, including those in rural areas.[321] Assuming that this is correct, the improved physical access to payday storefronts would likely have the largest impact on a small set of rural consumers who would have needed to travel substantially longer to reach a storefront,

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percent to 68 percent for payday loans, and a decrease in both loan volumes and revenues of 89 to 93 percent for vehicle title loans. 82 FR 54472, 54827, 54834. Taking the decreased values as the baseline and reintroducing the reduced loan volumes and revenues yields the numbers cited here.

[320] Supplemental Findings, chapter 3 part B.

[321] This geographic impact on borrowers was discussed specifically in the 2017 Final Rule's section on *Reduced Geographic Availability of Covered Short-Term Loans* in part VII.F.2.b.v which relies heavily on chapter 3 of the Bureau's Supplemental Findings. 82 FR 54472, 54842.

and who lack access to online payday loans (or strongly prefer loans initiated at a storefront to those initiated online).

Increased revenues (more precisely, increased profits) relative to the chosen baseline are expected to lead many current firms that would have exited the market under the Rule to remain in the market should this proposal take effect.[322] Additionally, many of the restrictions imposed by the 2017 Final Rule could have been voluntarily adopted by lenders absent the Rule but the Bureau has no evidence that they were. That they were not adopted implies the Rule's impacts are welfare-decreasing for lenders. Reversing these restrictions should therefore be welfare enhancing for lenders.

As for the effects on consumers, the Bureau noted in the 2017 Final Rule that the evidence on the impacts of the availability of payday loans on consumer welfare varies. The Bureau found that, in general, the evidence to date suggests that access to payday loans appears to benefit consumers in circumstances where they use these loans for short periods of time and/or to address an unforeseen and discrete need, such as when they experience a transitory and unexpected shock to their incomes or expenses.[323] The Bureau also found that the evidence to date suggests that, in more general circumstances, access to, and intensive use of, these loans appears to make consumers worse off. The Bureau summarized the evidence in the 2017 Final Rule, noting that "access to payday loans may well be beneficial for those borrowers with

[322] Should lenders have to comply with the Rule prior to the finalization of this proposal, it is possible that firms that exited the market because they had to comply would not return. However, the Bureau believes the demand for loans would remain such that the volume of loans and revenue estimates detailed in this analysis would still result. In this scenario, it is likely that there will be fewer lenders with increased (average) loan volumes.

[323] *See, e.g.*, 82 FR 54472, 54818, and 54842-46.

discrete, short-term needs, but only if they are able to successfully avoid long sequences of loans."[324]

As the 2017 Final Rule, which includes the conditional exemption for loans with a step-down in principal, allows for continued access to the credit that appears most beneficial—that which assists consumers with discrete, short-term needs—the Bureau believed that much of the welfare benefit estimated in the literature would be preserved under the Rule, despite the substantial reduction in availability of reborrowing.[325] Additionally, the 2017 Final Rule limited the potential costs that could be realized by borrowers who would have experienced long durations of indebtedness where the, albeit more limited, literature, and the Bureau's own analysis and study set forth in the 2017 Final Rule suggested that prolonged reborrowing has, on average, negative effects.[326] Given this, the Bureau concluded that the overall impacts of the decreased loan volumes resulting from the 2017 Final Rule's Mandatory Underwriting Provisions on consumers would be positive,[327] it follows that the inverse effects would ensue, relative to the chosen baseline, from this proposal to rescind the 2017 Final Rule. It bears emphasis, however, that the 2017 Final Rule's conclusion as to these effects was dependent upon the evidence that consumers who experienced long durations of indebtedness generally did not anticipate those outcomes and, as discussed above, the agency now believes that this evidence is not sufficiently robust and representative to support the findings necessary to determine that the identified practice is unfair and abusive.

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[324] *Id.* at 54846.

[325] *Id.* at 54818.

[326] *Id.* at 54839, 54842.

[327] *Id.* at 54835, 54842.

In drafting this proposal, the Bureau has also considered new and additional evidence that was not available at the time of the 2017 Final Rule. There are few such studies that deal with the pecuniary effects of payday loans on consumers, and none that specifically deal with the effects of the loans that would be eliminated by the 2017 Final Rule (*e.g.*, those beyond the fourth loan in a sequence or the seventh non-underwritten loan in a year). As a result, the new studies do not affect the Bureau's analysis as set forth above.

Relative to the considerations above, the remaining benefits and costs of this proposal—again relative to the baseline in which compliance with the 2017 Final Rule will become mandatory—are much smaller in their magnitudes and economic importance. Most of these impacts manifest as reductions in administrative, compliance, or time costs that compliance with the 2017 Final Rule will entail; or as potential costs from revoking aspects of the 2017 Final Rule that could have decreased fraud or increased transparency. The Bureau expects most of these impacts to be fairly small on a per loan/consumer/lender basis. These impacts include, among other things, those applicable to the RISes under the Rule; those associated with reduced furnishing requirements on lenders and consumers (*e.g.,* avoiding the costs to establish connection with RISes, forgone benefits from reduced fraud); those associated with making an ability-to-repay determination for loans that require one (*e.g.,* avoiding the cost to obtain all necessary consumer reports, forgoing the benefit of decreased defaults); those associated with avoiding the Rule's record retention obligations that are specific to the Mandatory Underwriting Provisions; those associated with eliminating the need for disclosures regarding principal step-down loans; and the additional impacts associated with increased loan volumes (*e.g.,* changes in defaults or account closures, non-pecuniary changes to consumer welfare). Each of these benefits and costs, broken down by type of market participant, is discussed in detail below.

The Bureau has also conducted a Paperwork Reduction Act (PRA) analysis to estimate the benefits associated with the proposal's reduction in the hour and dollar costs of the information collection requirements to the entities subject to the 2017 Final Rule. The PRA separates these estimates into one-time and annual ongoing categories for total burden reduction, labor burden hour reduction, and labor burden dollar reduction. As discussed in part X below, a revised Supporting Statement detailing the changes to the information collections for the Rule and their effects on the Rule's overall burden will be made available for public comment on the electronic docket accompanying this proposed rule.

The discussion of impacts that follows is organized into three main categories mentioned above: (1) the revocation of the 2017 Final Rule's requirement to reasonably determine borrowers' ability to repay covered short-term and longer-term balloon-payment loans; (2) the revocation of the recordkeeping requirements associated with (1); and (3) the revocation of the 2017 Final Rule's requirements concerning furnishing provisions. Within each of these main categories, the discussion is organized to facilitate a clear and complete consideration of the benefits, costs, and impacts of the major provisions of this proposed rule. Impacts on depository institutions with $10 billion or less in total assets and on rural consumers are discussed separately below.

B. Potential Benefits and Costs of the Proposal to Consumers and Covered Persons—Provisions Relating Specifically to Ability-to-Repay Determinations for Covered Short-Term and Longer-Term Balloon-Payment Loans

This section discusses the impacts of revoking the Mandatory Underwriting Provisions of the 2017 Final Rule relative to the chosen baseline in which compliance with the Rule was mandatory. Those provisions specifically relate to covered short-term and longer-term balloon-payment loans, and the analyses of their benefits and costs contained in the 2017 Final Rule were sensitive to the potential shifting to products not covered by the Mandatory Underwriting Provisions of the Rule (*i.e.,* the Bureau did not attempt to anticipate how lenders might adjust their offerings in light of the Rule). In the 2017 Final Rule, the Bureau stated that the potential evolution of lender offerings that may arise in response to the Rule was beyond the scope of the section 1022(b)(2) analysis contained therein;[328] similarly the Bureau does not attempt to assess here any strategic de-evolution of the market that will result if compliance with the 2017 Final Rule becomes mandatory.[329]

Revoking the requirements for originations, and the associated restrictions on reborrowing, is likely to have a substantial impact on the markets for these products relative to the markets that exist under the 2017 Final Rule. In order to present a clear analysis of the benefits and costs of the proposal, this section first describes the benefits and costs of the proposal to covered persons relative to the baseline where compliance with the 2017 Final Rule becomes mandatory and then discusses the implications of the proposal for the markets for these products. The benefits and costs to consumers are then described.

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[328] *Id.* at 54472, 54818, 54835.

[329] For example, there appears to be a shift in the market away from payday lending toward short-term installment lending. Payday loan revenue from both storefront and online channels declined from 2015 to 2016 by 11.9 percent and 9.9 percent, respectively. By contrast, short-term installment loan revenue was expected to increase 7.5 percent in 2017. Ctr. for Fin. Serv. Innovation, *2017 Financially Underserved Market Size Study*, at 12, 13, 18, 44, and 45 (Dec. 2017), https://s3.amazonaws.com/cfsi-innovation-files/wp-content/uploads/2018/03/07221553/2017-Market-Size-Report_FINAL_4-1.pdf. The Bureau does not attempt to anticipate if, or how much of, a move back to payday lending may result from this proposal, as it is beyond the scope of the available evidence, and the Bureau is unaware of any examples in the market that could provide such data.

1. Benefits and Costs to Covered Persons

This proposal would rescind a number of operational requirements on lenders making covered short-term and longer-term balloon-payment loans and remove restrictions on the number of these loans that can be made. As this proposal would rescind the requirements associated with the mandatory underwriting approach, it also obviates the need for the principal step-down approach set out in § 1041.6 of the 2017 Final Rule as an alternative to the mandatory underwriting approach in § 1041.5 for making covered short-term and longer-term balloon-payment loans.[330] As the proposal would remove restrictions on the operational requirements for lenders, allowing them to avoid making an ability-to-repay determination, this section discusses the overall benefits and costs to lenders associated with not having to comply with the Mandatory Underwriting Provisions in the 2017 Final Rule rather than having to do so.

a. Revocation of the Operational Requirements Associated with Mandatory Underwriting

Under the proposal, lenders would not be required to make an ability-to-repay determination prior to originating a loan, nor would they be required to ensure adherence to limits on loans made via the principal step-down approach, nor would they need to report loans to RISes to ensure compliance with those limits.

More specifically, under the proposal lenders would not need to consult their own records and the records of their affiliates to determine whether the borrower had taken out any prior covered short-term or longer-term balloon-payment loans that were still outstanding or were repaid within the prior 30 days. Lenders would not need to maintain the ability-to-repay-related

[330] The principal step-down approach is an alternative to the mandatory underwriting approach detailed in 12 CFR 1041.6. Under this approach, a lender would not need to determine ability-to-repay for an initial loan of up to $500. Subsequent loans issued within 30 days of an initial loan would need to amortize by one-third of the principal of the previous loan, and no more than three loans in a sequence, or six loans in a rolling 12-month period would be permitted. After reaching the limit imposed by the principal step-down approach, borrowers would need to obtain all further loans via the mandatory underwriting approach.

records mandated by the 2017 Final Rule. Lenders would not need to obtain a consumer report from an RIS (if available) in order to obtain information about the consumer's borrowing history across lenders, and would no longer be required to furnish information regarding covered short-term and longer-term balloon-payment loans they originate to all RISes. Lenders would also be freed from the obligation imposed by the 2017 Final Rule to obtain and verify information about the amount of an applicant's income (unless not reasonably available) and major financial obligations.

The proposed revocation of each of these operational requirements entails a reduction in costs that were to be incurred under the 2017 Final Rule for loan applications (not just for loans that are originated). Additionally, if and depending on when the proposal is adopted, lenders may not be required to develop or adhere to procedures to comply with each of these requirements and train their staff in those procedures. The Bureau believes that many lenders use automated systems when originating loans, and will modify those systems, or purchase upgrades to those systems, to address many of the operational requirements associated with the Mandatory Underwriting Provisions of the 2017 Final Rule. Reversing the obligation to incur operational costs should be of minimal benefit to lenders. Reversing the obligation in fact may actually result in small costs for any lenders who changed their processes and procedures in anticipation of having to comply with the Rule; however, lenders are under no obligation to reverse these modifications, and so any lender that would incur costs to do so could simply not reverse the modifications to avoid incurring them.

Each of the costs this proposal would obviate is considered in detail in the 2017 Final Rule at part VII.F.

Total Impacts of the Operational Requirements Associated with Mandatory Underwriting. In the 2017 Final Rule, the Bureau estimated that obtaining a statement from the consumer, taking reasonable steps to verify income, obtaining a national consumer report and a report from an RIS, projecting the consumer's residual income or debt-to-income ratio, estimating the consumer's basic living expenses, and arriving at a reasonable ability-to-repay determination will take essentially no additional time for a fully automated electronic system and between 15 and 45 minutes for a fully manual system. The Bureau further noted total costs would depend on the existing utilization rates of, and wages paid to, staff that will spend time carrying out this work. To the extent that lenders needed to increase staff and/or hours to comply with the 2017 Final Rule's operational requirements with respect to the mandatory underwriting approach, under the proposal they would experience decreased costs from hiring, training, wages, and benefits relative to what will occur under the 2017 Final Rule.

Additional savings under this proposal would come from what would have been an obligation to obtain a national consumer report costing between $0.55 and $2.00, and/or a report from an RIS costing $0.50. Lenders using third-party services to gather verification information about income would realize an additional small benefit under the proposal from avoiding the fees associated with using these services.

Developing Procedures, Upgrading Systems, and Training Staff. Under the 2017 Final Rule, lenders must develop policies and procedures to comply with the requirements of the Mandatory Underwriting Provisions and train their staff in those procedures. Many of these requirements are not qualitatively different from the practices in which most lenders would engage absent the 2017 Final Rule—such as gathering information and documents from borrowers and ordering various types of consumer reports—though the Rule's requirements may demand more, and more costly, efforts to obtain such information and documents.

Developing procedures to make a reasonable determination that a borrower has the ability to repay a loan without reborrowing while paying for major financial obligations and basic living expenses will likely be costly and challenging for many lenders. The Bureau expected that vendors, law firms, and trade associations will likely offer both products and guidance to lenders, potentially mitigating the cost of these procedures for lenders, because such service providers can realize economies of scale.[331]

The Bureau estimated that lender staff engaging in making loans would require approximately 5 hours per employee of initial training in carrying out the tasks described in the 2017 Final Rule and 2.5 hours per employee per year of periodic ongoing training; lenders would benefit if they did not have to incur these time costs if the Bureau adopts this proposal.

b. Operational Requirements—Principal Step-Down Approach

All of the costs described in the 2017 Final Rule associated with the principal step-down approach would be ultimately unnecessary under the proposal. This is because the principal step-down approach is an alternative to using the mandatory underwriting approach to issue new loans. Under this proposal, lenders would generally be expected to continue their pre-2017 Final Rule practices, and need not engage in any of the principal step-down procedures. As such, all benefits and costs associated with that approach would be eliminated under this proposal. This includes avoiding the system upgrades and time costs of providing the required disclosures.

[331] As noted above, the Bureau believes that many lenders use automated systems when originating loans, and will incorporate many of the operational requirements of the mandatory underwriting approach into those systems. While this may mitigate some of the costs discussed here, the operational costs will remain substantial.

c. Effect on Loan Volumes and Revenue from Eliminating Underwriting Requirements and Restrictions on Certain Reborrowing

In the 2017 Final Rule, the Bureau described the estimated effects of the underwriting requirements under the mandatory underwriting approach and the restrictions on certain reborrowing under both the mandatory underwriting approach and principal step-down approach. Those estimates were based on simulations, and the estimated effects on lender revenue were far more substantial than the increase in compliance costs from implementing the requirements.

In order to simulate the effects of the 2017 Final Rule, it was necessary to impose an analytic structure and make certain assumptions about the impacts of the Rule, and apply them to the data. The Bureau conducted three simulations of the potential impacts of the 2017 Final Rule on payday loan volumes—one each under the assumptions that loans are only made using the mandatory underwriting approach, that loans are made only under the principal step-down approach, and what the Bureau believed to be the most realistic assumption, that loans are made under both approaches—and a single vehicle title simulation.[332] The results of the simulations are reviewed here; the structure, assumptions, and data used by the Bureau were described in detail in the 2017 Final Rule.[333] None of the underlying data, assumptions, or structures have changed in the Bureau's analysis of the impacts of this proposal. As such, the description in the 2017 Final Rule also describes the simulations used here. Moreover, the estimated effects on loan volumes of rescinding the underwriting requirements are simply the effects as determined in the 2017 Final Rule of implementing these requirements. To assist the agency in doing a Section

[332] As vehicle title loans are not eligible for the principal step-down approach, simulating the effects on this market was more straightforward than for payday. As alternative assumptions about the prevalence of loans issued via the principal step-down vs. mandatory underwriting approaches were not appropriate, only a single structure for the vehicle title simulations was assumed.

[333] 82 FR 54472, 54824.

1022 analysis for any proposed final rule revoking the 2017 Final Rule, the Bureau seeks comment on the structure, assumptions, and data the agency used in these simulations.

The Bureau's simulations suggest that storefront payday loan volumes would increase between 104 percent and 108 percent under this proposal relative to the 2017 Final Rule baseline. The Bureau estimates that revenues of storefront payday lenders would be between 204 percent and 213 percent higher if they do not have to comply with the requirements in the 2017 Final Rule.[334] While these simulated results are based on data from storefront payday lenders, the Bureau explained in the 2017 Final Rule that the impacts are likely to be similar for online payday lenders;[335] the Bureau believes that to be the likely case with the proposal as well. Using the most recent estimated revenues for payday lenders by Center for Financial Services Innovation's (CFSI), lenders not having to comply with the requirements in the 2017 Final Rule would translate to an increase in their annual revenues of approximately \$3.4 billion to \$3.6 billion.[336]

For vehicle title lending, the simulated impacts are larger. The Bureau's simulations suggest that relative to the 2017 Final Rule baseline vehicle title loan volumes would increase under the proposal by between 809 percent and 1,329 percent, with a corresponding increase in

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[334] The loan volume and revenue estimates differ for payday loans as the 2017 Final Rule imposed limits on the sizes of loans issued under the principal step-down approach, as well as limits on the sizes of reborrowed loans. In the 2017 Final Rule, the Bureau estimated that approximately 40 percent of the reduction in revenues resulted from limits on loan sizes, while the remaining 60 percent was the result of decreased loan volumes. *Id.* at 54827. The increases in revenues presented here are estimated to stem from the same sources, in the same proportions (*i.e.,* approximately 40 percent from larger loans, and approximately 60 percent from additional loans).

[335] *Id.* at 54833.

[336] Based on pre-2017 Final Rule estimated revenues for payday lenders of approximately \$5.3 billion, reported in Eric Wilson & Eva Wolkowitz, *2017 Financially Underserved Market Size Study*, at 44 (Ctr. for Fin. Serv. Innovation, Dec. 2017), https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2017/04/27001546/2017-Market-Size-Report_FINAL_4.pdf, with medium confidence.

revenues for vehicle title lenders.[337] Using CFSI's most recent estimated revenues for vehicle title lenders, this would mean the proposed elimination of the Mandatory Underwriting Provisions of the 2017 Final Rule would translate into an increase in annual revenues for these lenders of approximately $3.9 billion to $4.1 billion.[338] It is also possible the impact on vehicle title lending would be even larger than the simulations suggest. If the industry were not able to survive as a result of complying with the Mandatory Underwriting Provisions of the 2017 Final Rule, the proposal could effectively resurrect the vehicle title lending industry relative to the baseline. In this case, the increased revenues from the proposal would be equal to the entire vehicle title lending industry's estimated annual revenue of approximately $4.4 billion.[339]

A notable impact of this increase in loan volumes and revenues is that many storefronts would likely exist under the proposal that would not if they had to comply with the Mandatory Underwriting Provisions of the 2017 Final Rule. A pattern of contractions in storefronts has played out in States that have imposed laws or regulations that resulted in similar reductions in volume as those projected under the 2017 Final Rule. To the extent that lenders cannot replace reductions in revenue by adapting their products and practices, it follows that such a contraction—or, in the case of vehicle title, an elimination—would be a likely (perhaps inevitable) response to complying with the Mandatory Underwriting Provisions of the 2017 Final

[337] As vehicle title loans are ineligible for the principal step-down approach under the 2017 Final Rule, there was no binding limit on the size of these loans. This resulted in a larger decrease in volumes for vehicle title loans relative to payday (as loans could only be issued under the mandatory underwriting approach), but ensured the corresponding decrease in revenues was more similar to the decrease in loan volumes (since all issued loans were unrestricted in their amounts relative to the Rule's baseline). The increases cited here follow a similar pattern, for similar reasons.

[338] Based on pre-2017 Final Rule estimated revenues for vehicle title lenders of approximately $4.4 billion, reported in Eric Wilson & Eva Wolkowitz, *2017 Financially Underserved Market Size Study*, at 46 (Ctr. for Fin. Serv. Innovation, Dec. 2017), https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2017/04/27001546/2017-Market-Size-Report_FINAL_4.pdf, with medium confidence.

[339] *Id.* In a similar vein, if the 2017 Final Rule had not contained the principal step-down exemption it too could have affected the survival of the payday loan industry.

Rule. It likewise follows that, under the proposal, there would be a corresponding increase in the number of storefronts relative to the number of them that would exist if they had to comply with the requirements of the 2017 Final Rule.

The Bureau notes that in recent years there has been a gradual shift in the market towards longer-term loans where permitted by State law. The Bureau does not have sufficient data to assess whether that trend has accelerated since the issuance of the 2017 Final Rule in anticipation of the compliance date.[340] This was considered in the 2017 Final Rule as well.[341] To the extent these lenders have already made these adaptations, and would not shift their business practices back if this proposal were adopted, the loan volume and revenue estimates above may be somewhat overstated.

2. Benefits and Costs to Consumers

a. Benefits to Consumers and Access to Credit

The operational requirements of the Mandatory Underwriting Provisions of the 2017 Final Rule would make the process of obtaining a loan more time consuming and complex for some borrowers (*e.g.*, online borrowers and vehicle title borrowers who may not currently be required to provide any documentation of income). The restrictions on lending in the 2017 Final Rule will reduce the availability of storefront payday loans, online payday loans, single-payment vehicle title loans, longer-term balloon-payment loans, and other loans covered by the Mandatory Underwriting Provisions of the Rule. Borrowers will likely experience reduced

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[340] Since the issuance of the 2017 Final Rule, Florida and Alabama have amended their laws to open the door to longer-term loans at interest rates above the standard usury limit. *See* Ala. Code § 5-18A; Fla. Stat. Ann. § 560.404. On the other hand, a voter referendum in Colorado has resulted in a law, effective February 1, 2019, that capped interest rates on certain longer-term loans. *See* Colo. Legislative Council Staff, *Initiative #126 Initial Fiscal Impact Statement*, https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2017-2018/126FiscalImpact.pdf; *see also* Colo. Sec'y of State, *Official Certified Result—State Offices & Questions,* https://results.enr.clarityelections.com/CO/91808/Web02-state.220747/#/c/C_2 (Proposition 111).

[341] 82 FR 54472, 54835.

access to new loans—*i.e.,* loans that are not part of an existing loan sequence—from these restrictions. Some borrowers also will be prevented from rolling loans over or reborrowing shortly after repaying a prior loan under the 2017 Final Rule. Some borrowers might still be able to borrow, but for smaller amounts or with different loan structures, and might find this less preferable to them than the terms they would have received absent the 2017 Final Rule. The proposal would reverse each of these effects that would otherwise result from the 2017 Final Rule, decreasing the time and effort consumers would need to expend to obtain a covered short-term or longer-term balloon-payment loan, and improving their access to credit, which may carry pecuniary and non-pecuniary benefits.

The Bureau's simulations (discussed above) suggest that the 2017 Final Rule's requirements (again including the principal step-down exemption) will prevent between 5.9 and 6.2 percent of payday borrowers from initiating a sequence of loans that they would have initiated absent the Rule.[342] That is, since most consumers take out six or fewer loans each year, and are not engaged in long sequences of borrowing, the Rule as a whole will not limit their borrowing. However, if the proposal is adopted, consumers would be able to extend their sequences beyond three loans and would not be required to repay one-third of the loan each time they reborrow. As a result, many loans would be taken out beyond the sequence limitations imposed by the 2017 Final Rule (*e.g.,* fourth and subsequent loans within 30 days of the prior loan); these loans account for the vast majority of the additional volume in the Bureau's simulations.

[342] The section-by-section analysis accompanying the 2017 Final Rule identified three categories of borrowers based upon their ex post behavior: repayers (those who take out a single loan and repay it without the need to reborrow within 30 days); defaulters (those who default after taking out a single loan or at the end of a sequence of loans); and reborrowers (those who take out a sequence of loans which ends with repayment). The simulation did not attempt to estimate which type(s) of consumers would be prevented from initiating a sequence of loans under the 2017 Final Rule or which type(s) of consumer would be able to obtain loans under the principal step-down exemption.

Revocation of Operational Requirements. The Bureau is proposing to rescind the operational requirements associated with underwriting loans originated via the mandatory underwriting approach, and the various recordkeeping procedures associated with the principal step-down approach. As such, under the proposal, the process of obtaining funds should be faster for consumers compared to the baseline of the 2017 Final Rule. Consumers obtaining loans that would have been subject to the Rule's mandatory underwriting requirements would see the most significant gains under the proposal. Estimates of the time required to manually process an application suggest that eliminating the mandatory underwriting requirements would subtract 15 to 45 minutes from the borrowing process, a consideration many of these consumers may find important given than convenience is an important product feature on which payday lenders compete for customers.[343] Additionally, borrowers would not need to obtain and provide to the lender certain documentation mandated under the mandatory underwriting requirements; the proposal would minimize the complexity of the process, and obviate the need for repeat trips to the lender if the borrower did not bring all the required documents initially, thereby making the payday loan process more convenient for consumers seeking loans that would otherwise been subject to the mandatory underwriting requirements. The proposal would thus decrease both the complexity and length of the process used for consumers who are seeking to obtain a covered short-term or longer-term balloon-payment loan that otherwise would have been subject to the mandatory underwriting requirements.

Improved Access to Initial Loans. As this proposal would remove the restrictions on obtaining a loan stemming from the 2017 Final Rule's Mandatory Underwriting Provisions'

[343] The Bureau noted in the 2017 Final Rule that it anticipated that most lenders would use automation to make the ability-to-repay determination, which would take substantially less time to process. *See* 82 FR 54472, 54631, 54632 n.767. For those borrowers seeking loans from these lenders, the time savings under the proposal would be substantially smaller.

requirements consumers would have increased access to loans. Initial covered short-term loans—*i.e.,* those taken out by borrowers who have not recently had a covered short-term loan—are presumably taken out because of a need for credit that is not the result of prior borrowing of covered short-term loans. Under the 2017 Final Rule, borrowers might be unable to take out new loans (those originated more than 30 days after their last loan) for at least two reasons: they may only have access to loans made under the mandatory underwriting requirements and be unable to demonstrate an ability to repay the loan under the Rule, or they may be unable to satisfy any additional underwriting requirements adopted by lenders in response to, though not required by, the Rule.

If lenders had to comply with the 2017 Final Rule, payday borrowers would not be likely to face the prescribed mandatory underwriting requirement unless and until they have exhausted the limits on loans available to them under the principal step-down approach, or unless the borrower is seeking a loan in excess of $500 or secured by a vehicle title (as the costs and restrictions associated with the principal step-down approach are generally lower compared to the mandatory underwriting approach, so loans under the principal step-down approach are likely to be used prior to loans under the mandatory underwriting approach, all else being equal). However, to obtain loans under the Rule's principal step-down approach, lenders might elect to require borrowers to satisfy more exacting underwriting requirements than would be applied by lenders if the proposal is adopted. This is because under the proposal lenders would be able to obtain more revenue from loans that are reborrowed in excess of the limits that would be imposed by the principal step-down approach, and would thus be willing to continue issuing loans to somewhat riskier borrowers. Moreover, after exhausting the limits on principal step-down approach loans in the Rule, borrowers would be required to satisfy the mandatory underwriting requirement to obtain a new loan; under the proposal, however, those more stringent requirements would no longer apply.

Based on the simulations contained in the 2017 Final Rule, the Bureau estimates that under the proposal about five percent more initial payday loans (*i.e.,* those that are not part of an existing sequence) would occur due to the revocation of the annual loan limits, and roughly six percent more borrowers would be able to initiate a new sequence of loans that they could not start under the 2017 Final Rule. That is, under the proposal five percent more payday loans that likely reflect a new need for credit would be allowed (based on the proposed removal of the annual limits on borrowing) and six percent of payday borrowers would have access to new sequences of loans as compared to the chosen baseline. Vehicle title borrowers are likely to realize greater benefits from increased access to loans relative to payday borrowers.

Consumers who would be able to obtain a new loan because of the proposal would not be faced with the effects of the 2017 Final Rule, including not being forced to forgo certain purchases, incur high costs from delayed payment of existing obligations, or incur high costs and other negative impacts by simply defaulting on bills; nor would they face the need to borrow from sources that are more expensive or otherwise less desirable. These borrowers may avoid overdrafting their checking accounts, which may be more expensive than taking out a payday or single-payment vehicle title loan. Similarly, they may avoid "borrowing" by paying a bill late, which can lead to late fees (which may or may not be more expensive than a payday or vehicle title loan) or other negative consequences like the loss of utility service.

Survey evidence provides some information about what borrowers are likely to do if they do not have access to these loans. Using the data from the CPS Unbanked/Underbanked supplement, researchers found that the share of households using pawn loans increased in States that banned payday loans, to a level that suggested a large share of households that would otherwise have taken out payday loans took out pawn loans instead.[344] A 2012 survey of payday loan borrowers found that a majority indicated that if payday loans were unavailable they would reduce expenses, delay bill payment, borrow from family or friends, and/or sell or pawn personal items.[345] Under the proposal, these consumers would not lose access to payday loans where it is their preferred method of credit.

Elimination of Limits on Loan Size. The 2017 Final Rule placed limits on the size of loans lenders may issue via the principal step-down approach, which, as discussed above, is one of the requirements for the conditional exemption from the mandatory underwriting approach for covered short-term loans. These limits are $500 for the initial loan, with each subsequent loan in a sequence decreasing by at least one-third the amount of the original loan. For example, a $450 initial loan would mean borrowers are restricted to no more than $300 for a second loan, and no more than $150 for a third loan. By eliminating these restrictions, the proposal would allow borrowers (specifically, borrowers who cannot satisfy the mandatory underwriting requirements for covered short-term loans and thus who can only borrow under the principal step-down approach) to take out larger initial loans (where allowed by State law), and reborrow these loans in their full amount. In the simulation that the 2017 Final Rule stated best approximates the market as it would exist under the Rule,[346] around 40 percent of the increase in payday loan

[344] Neil Bhutta et al., *Consumer Borrowing after Payday Loan Bans*, 59 J. of L. and Econ. 225 (2016).

[345] Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why*, at 16 (Report 1, 2012), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf (reporting $375 as the average).

[346] In the 2017 Final Rule, the Bureau describes the results from simulations under three sets of assumptions. This proposal presents results from the simulation approach preferred by the Bureau in the 2017 Final Rule as the one most likely to reflect the effects of the Rule, wherein borrowers are assumed to: take principal step-down loans initially, apply for loans subject to an ability-to-repay determination only after exhausting the principal step-down loans, and be approved for each loan under the mandatory underwriting approach with a probability informed by industry estimates.

revenues described in part VIII.B.1.c above would be the result of eliminating the $500 cap on initial loans and step-down requirements on loans issued via the principal step-down approach.

Elimination of Limits on Reborrowing. For storefront payday borrowers, most of the increase in the availability of credit if the proposal is adopted would be due to borrowers who have recently taken out loans being able to roll over their loans or borrow again within a shorter period of time as compared to the baseline of the 2017 Final Rule. This is because the mandatory underwriting and principal step-down provisions in the 2017 Final Rule impose limits on the frequency, timing, and amount of reborrowing and the proposal if adopted would lift these limitations.

The lessened constraints on reborrowing would additionally benefit consumers who wish to reborrow loans that would have been made via the principal step-down approach under the Rule but are unable to decrease the principal of their loans. For example, consider a borrower who has a loan due and is unable to repay one-third of the original principal amount (plus finance charges and fees) as required to obtain a second loan under the principal step-down approach, but who anticipates an upcoming influx of income. Under this proposal, such a borrower would experience the benefit of being able to reborrow the full amount of the loan until such time as the borrower realizes that income.[347] This improved access to credit could result in numerous benefits, including avoiding delinquencies on the loan and the potential NSF fees associated with such delinquencies, or avoiding the negative consequences of being compelled to make unaffordable amortizing payments on the loan. However, the Bureau's simulations suggest that the majority of the increased access to credit would result from the proposal's lifting of the

[347] Necessarily mitigating this benefit is the fact that defaulting on a payday loan has relatively few direct costs, while there are non-trivial direct costs associated with each instance of reborrowing. As such, this benefit would be most significant for those consumers with a high likelihood of the necessary influx of income being realized after fewer instances of reborrowing.

reborrowing restrictions, rather than its removal of the initial loan size cap and the forced step-down features of loans made via the principal step-down approach.

The Bureau does not believe the proposal, if adopted, would lead to a substantial decrease in instances of borrowers defaulting on payday loans, in part because the 2017 Final Rule's principal step-down provisions likely would encourage many consumers to reduce their debt over subsequent loans, rather than to default. It is necessarily true, however, that some borrowers who would be able to reborrow the full amount of the initial loan under the proposal may avoid a default that would have occurred under the Mandatory Underwriting Provisions of the Rule. This would be true for borrowers who would not have been able to successfully make the step-down payment on the principal step-down schedule, but can afford to pay just the fees (*i.e.*, the reborrowing cost) and then eventually repay the loan in full when they experience a positive income shock. These borrowers will thus avoid the costs of default as discussed below and enjoy the benefit of remaining in good standing with their lender and eligible for future borrowing when needed.

Increased Geographic Availability of Covered Short-Term Loans. Consumers would also have somewhat greater physical access to payday storefront locations under the proposal relative to the 2017 Final Rule baseline. As explained in the 2017 Final Rule, Bureau research on States that have enacted laws or regulations that led to substantial decreases in the overall revenue from storefront lending indicates that the number of stores has declined roughly in proportion to (*i.e.*, by roughly the same percentage as) the decline in revenue.[348] It follows that the proposal's impact on increasing the revenue of payday lenders relative to the 2017 Final Rule baseline should lead to a corresponding increase in the number of stores. This benefit is somewhat

[348] 82 FR 54472, 54487.

mitigated by the way payday stores locate, however. Nationwide, the median distance between a payday store and the next closest payday store is only 0.3 miles. When a payday store closes in response to laws that reduce revenue, there is usually a store nearby that remains open. For example, across several States with regulatory changes, between 93 and 95 percent of payday borrowers had to travel fewer than five additional miles to find a store that remained open. This is roughly equivalent to the median travel distance for payday borrowers nationwide. Using the loan volume impacts previously calculated above for storefront lenders, the Bureau forecasts that a large number of storefronts will remain open under the proposal that would have closed under the 2017 Final Rule, but that consumers' geographic access to stores will not be substantially affected in most areas.[349] The Bureau noted, however, that for consumers seeking single-payment vehicle title loans, the benefits would be far larger as the 2017 Final Rule's estimated impacts would lead to an 89 to 93 percent reduction in revenue which could affect the viability of the industry.[350]

b. Costs to Consumers

Relative to the 2017 Final Rule baseline, the available evidence suggests that the proposal would impose potential costs on consumers by increasing the risks of: experiencing costs associated with extended sequences of payday loans and single-payment vehicle title loans; experiencing the effects (pecuniary and non-pecuniary) of delinquency and default on these

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[349] The positive effects of increased storefront access are likely to be relatively larger in more rural areas; the impacts of this proposal on rural areas are considered in more detail below. There may also be benefits to consumers from other "convenience factors" associated with increased competition. Examples could include longer hours during which a nearby payday store is open, shorter wait times, etc. However, the Bureau lacks data or evidence that would allow for a conclusion that such benefits would result from the proposal, if adopted.

[350] 82 FR 54472, 54817, 54834-35.

loans; defaulting on other major financial obligations; and/or being unable to cover basic living expenses in order to pay off covered short-term and longer-term balloon-payment loans.[351]

Extended Loan Sequences. As discussed in greater detail in the 2017 Final Rule, the available evidence suggests that, absent that Rule, a material percentage of borrowers who take out storefront payday loans and single-payment vehicle title loans often end up taking out many loans in a row. This evidence came from the Bureau's own work, as well as analysis by independent researchers and analysts commissioned by industry. This proposal's removal of the 2017 Final Rule's limitations on making loans to borrowers who have recently had relevant covered short-term and longer-term balloon-payment loans would enable borrowers to continue to borrow in these longer sequences of loans. As discussed above, some consumers who would choose under the proposal to reborrow beyond the limits imposed by the 2017 Final Rule might realize benefits, but would not be able to do so in the baseline. The evidence suggests, however, that the majority of consumers who would choose under the proposal to reborrow beyond the limits imposed by the 2017 Final Rule would incur costs, costs they would not incur under the baseline. Studies have suggested that potential consequences from such reborrowing include increases in the delays in payments on other financial obligations, involuntary checking account closures, NSF and overdraft fees, financial instability, stress and related health measures, and decreases in consumption.[352] (The elimination of the step-down structure imposed by the 2017

[351] As mentioned previously, the effects associated with longer-term balloon-payment loans are likely to be small relative to the effects associated with payday and vehicle title loans. This is because longer-term balloon-payment loans are uncommon in the baseline against which costs are measured.

[352] The studies describing these results are discussed in the section 1022(b)(2) analysis of the 2017 Final Rule (82 FR 54472, 54842-46) and below. As described therein, some of these studies differentiate between shorter and longer loan sequences. The majority of studies, however, rely on access to loans as their source of variation, and cannot make such distinctions. Similarly, few of these studies distinguish between the effects of loan amount independent of sequence length.

Final Rule's Mandatory Underwriting Provisions may have similar effects; however, the Bureau is not aware of any studies that address this possibility.)

However, these observed seemingly negative outcomes do not necessarily imply a decrease in consumer surplus. A conclusion that these impacts result in negative consumer surplus requires not just that the apparent impacts on consumers are negative, but also that these impacts were not accurately anticipated by the consumers and that consumers would have made different choices with more complete information. If these are the impacts of initiating a loan sequence for a significant share of consumers, and these impacts are not accurately anticipated (*e.g.*, if consumers do not fully understand how long they are likely to be in debt), then economic analysis would suggest the effect on consumer surplus is likely negative. If, on the other hand, consumers making their initial borrowing decisions accurately anticipate the potential for these impacts, then the effect on consumer surplus is likely to be (at least weakly) positive, as there would be unobserved, unquantifiable, offsetting benefits.

The Bureau weighed these possible outcomes in the 2017 Final Rule in part VII.F.2 noting that the evidence on the impacts of the availability of payday loans on consumer welfare varies; that most studies focused on what happens when all access to payday loans is eliminated as opposed to restricted; and that within that body of literature studies have provided evidence that access to payday loans can have positive, negative, or no effects on various consumer outcomes. The Bureau's synopsis of the available evidence presented there (and above) is that access to payday loans may well be beneficial for those borrowers with discrete, short-term needs, but only if they are able to successfully avoid unanticipated long sequences of loans. The Bureau further concluded that the available evidence suggests that consumers who end up engaging in long sequences of reborrowing generally do not anticipate those outcomes *ex ante*[353] and that the 2017 Final Rule, on average (and taking into account potential alternatives to which consumers might turn if long sequences were proscribed), is welfare enhancing for such consumers.[354]

As this proposal's increase in access to credit is concentrated in long durations of indebtedness where the, albeit limited, evidence suggest the welfare impacts are negative on average, the estimated effect on average consumer surplus from these extended loan sequences would be negative relative to the chosen baseline.

Increased Defaults and Delinquencies. Default rates on payday loans prior to the 2017 Final Rule were fairly low when calculated on a per loan basis (two percent in the data the Bureau analyzed).[355] A potentially more meaningful measure of the frequency with which consumers experience default is therefore the share of loan sequences that end in default—including single-loan sequences where the consumer immediately defaults and multi-loan sequences which end in default after one or more instances of reborrowing. The Bureau's data show that, using a 30-day sequence definition (*i.e.*, a loan taken within 30 days of paying off a prior loan is considered part of a sequence of borrowing), 20 percent of loan sequences ended in default prior to the 2017 Final Rule. Other researchers have found similar high levels of default. A study of payday borrowers in Texas found that 4.7 percent of loans were charged off but 30

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[353] See 82 FR 54472, 54568-70, 54816-17 (discussing the Bureau's analysis of certain data from the Mann Study including statistical evidence showing, in Professor Mann's words, "that there is no significant relationship between the predicted number of days and the days to clearance"); *see also* Email from Ronald Mann, Professor, Columbia Law School to Jialian Wang and Jesse Leary, Bureau of Consumer Fin. Prot., (Sept. 24, 2013) (on file).

[354] For a discussion of alternative sources of credit, see 82 FR 54472, 54609-11, 54841.

[355] Default here is defined as a loan not being repaid as of the end of the period covered by the data or 30 days after the maturity date of the loan, whichever is later.

percent of borrowers had a loan charged off in their first year of borrowing.[356] It is reasonable to assume a return to these market conditions under the proposal.

As previously discussed, the Bureau believes that some borrowers who would be able to reborrow the full amount of the initial loan under the proposal may avoid a default that would have occurred if lenders had to comply with the Mandatory Underwriting Provisions of the Rule. This would be the result for borrowers who would not have been able to successfully make the step-down payment on the principal step-down schedule, but could afford to pay just the fees, *i.e.*, the reborrowing cost, and then eventually repay the loan in full when they experience a positive income shock. This also would be the result for borrowers who are able to obtain an initial loan, cannot demonstrate an ability to repay when seeking to reborrow, but would in fact be able to repay after experiencing a positive income shock. However, the Bureau believes that some borrowers taking out payday loans may experience additional defaults under the proposal than they would under the 2017 Final Rule. This would occur in instances where the principal step-down requirement would have resulted in borrowers not reborrowing relatively larger amounts that could lead to an eventual default. As discussed in the 2017 Final Rule, the Bureau believes the consequences of defaults can be harmful to at least some consumers, or in specific circumstances. If this proposal were to increase defaults on net, this would represent a potential cost to consumers.[357] However, the Bureau does not know the prevalence of the possible

[356] Paige Marta Skiba & Jeremy Tobacman, *Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default*, at tbl. 2 (Vand. L. and Econ. Sch., Research Paper No. 08-33, 2008). Note that it may not be the case that all defaulted loans were charged off.

[357] For a more detailed discussion of the costs of defaults and delinquencies, as well as the reasoning behind their likely increased prevalence under this proposal, see 82 FR 54472, 54838.

increased defaults nor can it provide an estimate of the total potential cost per default to consumers.[358]

The source of those perceived default costs is unclear. Defaulting on a payday loan may initially appear to be relatively low cost for consumers, given that lenders generally do not report to the major credit bureaus and may not choose to pursue collection litigation if the amount owed is small. However, as lenders take a post-dated check (or account access) to secure the loan, and will seek to obtain payment by that method if the consumer fails to return to the store to repay (or reborrow), default can only occur when the consumer's account balance (inclusive of any overdraft buffer) has less than the amount owed. Default, as defined as a failed presentment of the post-dated check, therefore often results in NSF assessments. This could lead to negative balances and ultimately may lead or contribute to involuntary account closures which can decrease a consumer's access to checking accounts in the future. For example, in data analyzed by the Bureau, half of all identified online payday borrowers' accounts have at least one presentment from an online payday lender that results in overdraft or failure due to NSF during the 18-month observation period, resulting in an average of $185 in fees.[359] Note, however, there are many potential debits or attempted debits that can contribute to account closures, and the Bureau has not disentangled the effects of attempts to collect on payday loans from other potential contributing causes to account closures.

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[358] See Paige Marta Skiba & Jeremy Tobacman, *Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default* (Vand. L. and Econ. Sch., Research Paper No. 08-33, 2008) for a structural model examining reborrowing behavior including potential default costs.

[359] Bureau of Consumer Fin. Prot., *Online Payday Loan Payments* (Apr. 2016), https://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf.

In addition to default costs resulting from lenders' access to consumers' checking accounts, the 2017 Final Rule also noted that borrowers who default may be subject to collection efforts which can take aggressive forms, including repeated phone calls, in-person visits to the consumer's home or workplace, and calls or visits to consumers' friends or relatives.[360]

Additionally, both the loss of the option value of future borrowing and non-pecuniary costs of failing to pay may add to the consumer's perception of the cost of default. The option value refers to the opportunity to borrow again in the future, at least from the specific lender, which is decreased after a default. This results in additional costs to the consumer in terms of decreased access to credit, or additional search beyond their preferred lender, that may, or may not, be accurately understood by the consumer at the time of initial borrowing. Default may also impose non-pecuniary costs, such as the loss of access to the borrower's preferred lender. The Bureau seeks additional information on the expected change in the prevalence of default and the costs associated therewith.

For borrowers who would take out short-term vehicle title loans under the proposal, the impacts would be greater. As previously noted, the 2017 Final Rule will end virtually all such lending. Default rates on single-payment vehicle title loans are higher than those on payday loans. Additionally, as there will be a relatively greater increase in vehicle title loans compared to payday loans, the increase in defaults on vehicle title loans that would result from this proposal would be relatively larger compared to payday. In the data analyzed by the Bureau for the 2017 Final Rule, the default rate on all loans is nine percent, and the sequence-level default

[360] 82 FR 54472, 54574.

rate is 31 percent.[361] In the data the Bureau has analyzed, five percent of all single-payment vehicle title loans lead to repossession, and 18 percent of sequences of loans end with repossession. So, at the loan level and at the sequence level, slightly more than half of all defaults lead to repossession of the borrower's vehicle.

The range of potential ancillary impacts on a borrower of losing a vehicle to repossession depends on the transportation needs of the borrower's household and the available transportation alternatives. According to two surveys of vehicle title loan borrowers, 15 percent of all borrowers report that they would have no way to get to work or school if they lost their vehicle to repossession.[362] Fully 35 percent of borrowers pledge the title to the only working vehicle in the household.[363] Even those with a second vehicle or the ability to get rides from friends or take public transportation might experience inconvenience or even hardship from the loss of a vehicle. The Bureau seeks additional information on the prevalence and costs of the possible ancillary effects of repossession.

Similarly, to the extent the proposal would increase the number of payday and vehicle title loans and length of loan sequences relative to the 2017 Final Rule, the proposal likely would increase the frequency of delinquencies. Borrowers who become delinquent may incur penalty fees, late fees, or NSF fees, which can have associated indirect costs (*e.g.,* delinquencies on other

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[361] There is also evidence that the default rates on longer-term balloon-payment title loans are high. The Bureau has data for a single lender that made longer-term vehicle title loans with both balloon and amortizing payment schedules. Those loans with balloon payments defaulted at a substantially higher rate. *See* Supplemental Findings at 30.

[362] Kathryn Fritzdixon et al., *Dude, Where's my Car Title?: The Law Behavior and Economics of Title Lending Markets*, 2014 U. Ill. L. Rev. 1013, 1038 (2014); Pew Charitable Trusts, *Auto Title Loans—Market practices and borrower experiences*, at 14, tbl. 3 (2015), http://www.pewtrusts.org/~/media/assets/2015/03/autotitleloansreport.pdf.

[363] Pew Charitable Trusts*, Auto Title Loans—Market practices and borrowers' experiences*, at 14 (2015), http://www.pewtrusts.org/~/media/assets/2015/03/autotitleloansreport.pdf.

bills, difficulty meeting their basic living expenses, etc.). Late payments on payday loans (defined as a payment that is sufficiently late that the lender deposits the borrower's check or attempts to collect using ACH authorization) appear to range from seven[364] to over 10 percent.[365] These late payments can be costly for borrowers. If a lender deposits a check or submits a payment request and it is returned for insufficient funds, the borrower's bank or credit union will likely charge the borrower an NSF fee of approximately $35, and the lender may charge a returned-item fee. It should be noted, however, that the harm from NSF will be mitigated by the limitations on payment practices and related notices, as required by the Payment Provisions described in the section-by-section analysis of the 2017 Final Rule. The Bureau does not know the total potential cost of potential increased delinquencies from the proposal, and it therefore seeks additional information about these costs.

c. New Evidence on the Benefits and Costs to Consumers of Access to Payday and Other Covered Short-Term and Longer-Term Balloon-Payment Loans

There have been several studies made available since the 2017 Final Rule that address the welfare effects of payday loans. As noted earlier, the evidence in these studies did not alter the Bureau's views based on earlier evidence; however, it is important to include these in this discussion of the evidence that bears on the benefits and costs of the proposal. The Bureau seeks

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[364] "For the years ended December 31, 2011 and 2010, we deposited customer checks or presented an Automated Clearing House (ACH) authorization for approximately 6.7 percent and 6.5 percent, respectively, of all the customer checks and ACHs we received and we were unable to collect approximately 63 percent and 64 percent, respectively, of these deposited customer checks or presented ACHs. Total charge-offs, net of recoveries, for the years ended December 31, 2011 and 2010 were approximately $106.8 million and $108 million, respectively." Advance America, 2011 Annual Report (Form 10-K), at 27, *available at* http://www.sec.gov/Archives/edgar/data/1299704/000104746912002758/a2208026z10-k.htm.

[365] Paige Marta Skiba & Jeremy Tobacman, *Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default* (Vand. L. and Econ. Sch., Research Paper No. 08-33) (2008).

comment on any additional relevant research, information, or data that has arisen since the 2017 Rule was published.

Studies of the Direct Effects of Payday Loans and Small Dollar Loan Regulations. As was the case with the studies described in the 2017 Final Rule, the new evidence about the benefits and costs of payday loans discussed here is not uniform in its welfare implications. Bronson and Smith (2018) surveyed 48 payday loan borrowers in Southeast Alabama to assess their satisfaction with payday loans.[366] The authors ask a limited number of questions, but find that 87.5 percent of respondents are "extremely" or "very" satisfied with payday loans on average, but that only 41.7 percent are "extremely" or "very" satisfied with their most recent loan.[367] They also show that 71 percent of payday borrowers, were they to not have access to a payday loan, would seek an alternative loan (*e.g.,* credit card, borrow from family or friend).[368] Finally, the authors show that fewer than 21 percent of respondents support limits on the number or dollar amount of loans available, and that none of the respondents support an outright ban of payday loans.[369] The authors note the limited scope of their study, which focuses on few customers in a very specific geographic region. Additionally, the methodology employed leads to a self-selected, likely non-representative sample of respondents, limiting the usefulness of these results for informing this analysis of benefits and costs.[370]

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[366] Christy A. Bronson & Daniel J. Smith, *Swindled or Served?: A Survey of Payday Lending Customers in Southeast Alabama*, 40 S. Bus. & Econ. J. 16 (2017).

[367] *Id.* at 22-23.

[368] *Id.* at 25.

[369] *Id.* at 23-24.

[370] Respondents were solicited by surveyors standing in public places who asked if the respondent had taken a payday loan and was willing to complete a survey. No validation of actual experience with payday loans was attempted for respondents, let alone non-respondents.

Lukongo and Miller (2017) found that Arkansas' binding interest rate cap creates additional costs for consumers of small-dollar installment products.[371] The authors show that Arkansas' interest rate cap did not decrease demand for small-dollar installment loans, noting that many Arkansans in counties adjacent to States allowing these loans take small-dollar installment loans. The authors also document an "installment loan credit desert" in the interior of Arkansas (noting that nearly 97 percent of Arkansans holding these loans reside in perimeter counties), and that transportation costs increase the effective APR for those borrowers who are able to travel in order to obtain such loans. While not directly related to payday (small-dollar installment loans have a different structure that is not affected by the 2017 Final Rule or this proposal), this study documents that demand for credit is not eliminated by restrictions on the supply of that credit, and that customers in border counties are better able to travel across State lines to obtain loans, and do so with some frequency.

Ramirez (2017) shows that when Ohio constrained interest rates on payday loans in 2008, licenses for pawn brokers, precious metal buyers, alternative small-loan, and second-mortgage lending increased.[372] The author concludes that demand for the credit previously satisfied by payday loans persisted after the reducing in the availability of those loans, and that supply-side effects evolved in order to partially meet this demand. The author's implication is that these alternatives to payday loans are substitutes (though likely imperfect ones). The Bureau notes there may be other likely imperfect substitutes for payday loans available to consumers, such as borrowing from relatives, decreasing expenses, borrowing from an unlicensed lender, but the

[371] Onyumbe Enumbe Lukongo & Thomas W. Miller, *Adverse Consequences of the Binding Constitutional Interest Rate Cap in the State of Arkansas* (Mercatus Working Paper, 2017), https://www.mercatus.org/system/files/lukongo_wp_mercatus_v1.pdf.

[372] Stefanie Ramirez, *Payday-Loan Bans: Evidence of Indirect Effects on Supply* (SSRN Working Paper, 2017).

Bureau does not have data concerning to what extent these alternatives are available and at what prices as well as the ancillary benefits and costs associated with these possible alternatives.

Studies Describing the Links between Payday Loans and Health Issues. The 2017 Final Rule described in general terms that payday loan use could be associated with non-pecuniary benefits or costs, but did not present empirical evidence of these impacts.[373] A newer payday-related literature shows correlations between payday loan access or use and health outcomes.[374]

Cuffe and Gibbs (2017) explore the relationship between payday loan access and liquor sales.[375] The authors find a persistent reduction in liquor sales resulting from payday lending regulations that restricted access for frequent payday loan users. They also show that this decline in sales is nearly three times larger for liquor stores closest to payday lenders. Importantly, the authors also find no corresponding decline in overall expenditures from the restricted access to payday loans. The authors imply these finding could have public health impacts, though they do not provide estimates of these impacts, and the direction of any overall welfare impacts is not clear.[376]

Eisenberg-Guyot et al. (2018) assess the impact of "fringe banking services" on health outcomes.[377] Using Current Population Survey data and propensity score matching, the authors show "fringe loan" use is associated with 38 percent higher prevalence of reporting poor health.

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[373] The Bureau was aware of at least one of these papers prior to the 2017 Final Rule. At the time, the paper was a working paper with preliminary results. As such, the Bureau chose not to discuss its findings in the 2017 Final Rule.

[374] However, the Bureau underscores that correlation between two variables does not necessarily imply causation, specifically, that payday loan access or use is the cause of these health outcomes.

[375] Harold E. Cuffe & Christopher G. Gibbs, *The Effect of Payday Lending Restrictions on Liquor Sales*, 85(1) J. Banking & Fin. 132-45 (2017).

[376] The authors also note specific behavioral biases with which their findings are consistent. However, they are unable to test for any specific biases that actually are at play. As such, the Bureau's analysis is not informed by this aspect of the paper.

[377] Jerzy Eisenberg-Guyot et al., *From Payday Loans To Pawnshops: Fringe Banking, The Unbanked, And Health*, 37(3) Health Aff. 429 (2018).

The authors imply that the magnitude suggests that at least some fringe loan use may cause a decline in perceived health. However, the authors do not compellingly address the possibility of reverse causality: *i.e.*, the possibility that individuals suffering (or reporting to suffer) poor health are more likely to use payday loans. Additionally, if payday borrowers affected by this proposal would be using other "fringe loans" absent the proposal, the proposal's increase in payday and vehicle title access would have no effect on their health.

Sweet et al. (2018) use data from a small, non-random survey of debt and health to test whether short-term loans are associated with emotional and physical health indicators.[378] They find that having ever used a short-term loan is associated with a number of risk factors, including poor physical health and anxiety, even after controlling for several socio-demographic covariates. However, the survey used is small (n=286), they do not distinguish between types of loans, frequency of use, or when a loan was used, and their sample comes from one metropolitan statistical area (MSA) in a State with an interest rate cap that does not allow for traditional payday lending (Boston, MA).

In the only study regarding health effects of payday loan access using a causal identification strategy, Lee (2017) explores the link between payday loans and household welfare by estimating the impact of payday loan access on an extreme measure of household distress: suicide.[379] The author uses a distance to border and difference-in-difference identification approach to provide evidence consistent with payday loans increasing the risk of suicide attempts for low- and moderate-income borrowers and employed workers. The author also shows that

[378] Elizabeth Sweet et al., *Short-term lending: Payday loans as risk factors for anxiety, inflammation and poor health*, 5 SSM—Population Health, 114-121 (2018), https://doi.org/10.1016/j.ssmph.2018.05.009.

[379] Jaeyoon Lee, *Credit Access and Household Welfare: Evidence from Payday Lending* (SSRN Working Paper, 2017).

completed suicides increase by relatively more than attempts. The estimated magnitudes are quite high. Notably, the author does not estimate whether the increase in suicide risk associated with initial access to payday loans is reversed (or possibly even exacerbated) by the removal of some of that access and as such, the implication for this proposal's effective reinstatement of access to more borrowing is unclear.

Studies Describing the Links between Financial Education and Payday Loan Use. An expanding literature deals with the impact of financial education and literacy on the use of payday loans.

For example, Harvey (2017) shows that financial education mandates significantly reduce the likelihood and frequency of payday borrowing.[380] Specifically, the author finds that individuals who were mandated to take personal finance classes in high school are less likely to have used payday loans, and used fewer payday loans compared to those individuals who did not have a mandated personal finance class. Kim and Lee (2017) explore whether financial literacy impacts payday loan use and find, using the 2012 National Financial Capability Study, that increased financial literacy is negatively associated with payday loan use.[381] In slight contrast, Alyousif and Kalenkoski (2017) use a self-selected sample to find that seeking financial advice about savings and investment is associated with less payday loan use, but that seeking debt counseling is correlated with a higher chance of payday loan use.[382]

[380] Melody Harvey, *Impact of Financial Education Mandates on Younger Consumers' Use of Alternative Financial Services* (SSRN Working Paper, 2017).

[381] Kyoung Tae Kim and Jonghee Lee, *Financial literacy and use of payday loans in the United States*, 25(11) Applied Econ. Letters 781 (2017).

[382] Maher Alyousif & Charlene M. Kalenkoski, *Asking for Action: Does Financial Advice Improve Financial Behaviors?* (SSRN Working Paper, 2017).

While the relationship between financial education and literacy and payday loan use has only indirect implications for the impacts of payday loan use on consumers, the apparent finding that consumers with greater financial education and literacy use payday loans less may imply that the use of these loans is at least somewhat driven by the information consumers have about these loans. This, in turn, could have implications for the consumer surplus that would result from use of these loans. But perhaps the more direct implication is that improved financial education programs and opportunities could be a viable alternative to more direct market interventions such as issuing regulations.

Summary of Research Findings on the Welfare Effects of Consumers of Payday Loan Use. The Bureau believes the new research described here supplements, and does not contradict, the research described in the 2017 Final Rule. The Bureau welcomes comment on these new studies and other new research concerning the effect on consumers from using payday loans.

C. Potential Benefits and Costs of the Proposal to Consumers and Covered Persons—Recordkeeping Requirements

The 2017 Final Rule requires lenders to maintain sufficient records to demonstrate compliance with the Rule. Those requirements include, among other records to be kept, loan records; materials collected during the process of originating loans, including the information used to determine whether a borrower had the ability to repay the loan, if applicable; records of reporting loan information to RISes, as required; and records of attempts to withdraw payments from borrowers' accounts, and the outcomes of those attempts. The Bureau's proposed revocation of the Mandatory Underwriting Provisions would eliminate the recordkeeping requirements set forth in the 2017 Final Rule that are not related to payment withdrawal attempts.

1. Benefits and Costs to Covered Persons

The Bureau estimated in the 2017 Final Rule that the costs associated with electronic storage of records was small. As such, the Bureau estimates the benefits from avoiding these costs under the proposal to be small as well. Specifically, the Bureau estimates the benefits to be less than $50 per lender if they purchased additional storage themselves (*e.g.,* a portable hard drive) to comply with the 2017 Final Rule, or $10 per month if they leased storage (*e.g.,* from one of the many online cloud storage vendors). Lenders would also avoid the need to develop procedures and train staff to retain records under this proposal; these benefits are included in earlier estimates of the benefits of no longer needing to develop procedures, upgrade systems, and train staff.

2. Benefits and Costs to Consumers

Consumers will be minimally affected by the proposed revocation of mandatory underwriting-related recordkeeping requirements.

D. Potential Benefits and Costs of the Proposal to Consumers and Covered Persons—Requirements Related to Information Furnishing and Registered Information Systems

As discussed above, the 2017 Final Rule requires lenders to report covered short-term and longer-term balloon-payment loans to every RIS. This requirement would be eliminated by this proposal, as would the potential benefits and costs from the existence of, and reporting to, every RIS.

1. Benefits and Costs to Covered Persons

The proposal, if adopted, would eliminate the benefits, described in the 2017 Final Rule, that are afforded to firms that apply to become RISes by eliminating the requirement on lenders to furnish information regarding covered short-term and longer-term balloon-payment loans to every RIS and to obtain a consumer report from at least one RIS before originating such loans.

The proposal, if adopted, would also eliminate the benefits to lenders from access to RISes described in the 2017 Final Rule. Most of these benefits would result from decreased fraud and increased transparency. These benefits include, *inter alia*, easier identification of borrowers with past defaults on payday loans issued by other lenders, avoiding issuing loans to borrowers who currently have outstanding loans from other lenders, etc. This proposal's elimination of these benefits would represent a cost to lenders.

2. Benefits and Costs to Consumers

The proposed elimination of the RIS-related requirements would have minimal impact on consumers. The largest benefit for consumers from the RIS-related provisions, as noted in the 2017 Final Rule, was compliance by lenders with the underwriting requirements of the Rule. This benefit would be moot, given the proposed revocation of the Rule's Mandatory Underwriting Provisions. The remaining benefits this proposal would eliminate are small.

E. Other Unquantified Benefits and Costs

Some of the proposal's impacts noted above are difficult if not impossible to quantify, because their magnitudes or values are unknown or unknowable. One of the most notable of these is the consumer welfare impact of increased access to short-term vehicle title loans. While the structure of these loans is somewhat similar to payday loans, there are no direct studies of the impact of these loans on consumer welfare. Additionally, there is no obvious way to sign or scale the welfare effects of access to vehicle title loans relative to payday loans. For example, it is possible that the larger loan amounts available from vehicle title lenders enable consumers to better handle more substantial financial shocks and that the risk of losing a vehicle in the event of default provides consumers with greater incentives to become more fully informed before initiating loans. This would result in relatively more positive welfare effects relative to payday loans. However, it is also possible that the larger loan amounts may result in more repossessions after defaults that may have additional adverse consequences for some consumers. If this possibility were the reality, the welfare effects of the proposal would be more negative for vehicle title consumers than for payday consumers. However, within the set of 17 States that permit short-term vehicle title lending, 12 also permit longer-term lending;[383] so the substitution of longer-term lending for short-term lending has significant potential to mitigate the negative welfare impacts of the proposal. Absent reliable evidence about the welfare effects of access to short-term vehicle title loans, the Bureau does not attempt to quantify these effects here.

There are other, less direct effects of the proposal that are also left unquantified. These impacts include (but are not limited to): intrinsic utility ("warm glow") from access to loans that are not available under the 2017 Final Rule; innovative regulatory approaches by States that would have been discouraged by the 2017 Final Rule; public and private health costs that may (or may not) result from payday loan use; suicide-related costs that may (or may not) result from increased access to loans; changes to the profitability and industry structure in response to the 2017 Final Rule (*e.g.,* industry consolidation that may create scale efficiencies, movement to installment product offerings) that would not occur under the proposal; concerns about regulatory uncertainty and/or inconsistent regulatory regimes across markets; benefits or costs to outside parties associated with the change in access to payday loans (*e.g.,* revenues of providers of payday substitutes like pawnshops, overdraft fees paid by consumers and received by financial

[383] One of the States that only allows short-term vehicle title lending is Ohio, but recent legislation will eliminate such lending in April 2019. Note that an additional 6 States only allow longer-term vehicle title lending, and those would be unaffected by this proposal.

institutions, the cost of late fees and unpaid bills, etc.); indirect costs arising from increased repossessions of vehicles in response to non-payment of title loans; non-pecuniary effects associated with financial stress that may be alleviated or exacerbated by increased access to/use of payday loans; and any impacts on lenders of fraud and opacity related to a lack of industry-wide RISes (*e.g.*, borrowers circumventing lender policies against taking multiple concurrent payday loans, lenders having more difficulty identifying chronic defaulters, etc.). If there exist credible quantitative estimates of these impacts, the Bureau welcomes comments providing those estimates.

F. Potential Impact on Depository Creditors With $10 Billion or Less in Total Assets

The Bureau believes that depository institutions and credit unions with less than $10 billion in assets are minimally constrained by the 2017 Final Rule's Mandatory Underwriting Provisions. To the limited extent depository institutions and credit unions did make loans in this market, many of those loans were conditionally exempted from the 2017 Final Rule under § 1041.3(e) or (f) as alternative or accommodation loans. As such, this proposal would have minimal impact on these institutions.

However, it is possible that the removal of the 2017 Final Rule's restrictions would allow depository institutions and credit unions with less than $10 billion in assets to develop products that are not viable under the 2017 Final Rule (subject to applicable Federal and State laws and under the supervision of their prudential regulators).[384] To the extent these products are

[384] As discussed previously, this may be even more likely than it would have been at the time the 2017 Final Rule was drafted. The OCC not only rescinded guidance on deposit advance products, but has also encouraged banks to explore additional small-dollar installment lending products. Additionally, the FDIC is seeking comment on small-dollar products that its banks could offer. These factors might allow for additional lending if not for the 2017 Final Rule (*e.g.*, some additional product offerings may result from this proposal that would have been inviable under the 2017 Final Rule).

developed and successfully marketed, they would represent a benefit of this proposal for these institutions.

G. Potential Impact on Consumers in Rural Areas

Under the proposal, consumers in rural areas would have a greater increase in the availability of covered short-term and longer-term balloon-payment loans originated through storefronts relative to consumers living in non-rural areas. As described above, the Bureau estimates that removing the restrictions in the 2017 Final Rule on making these loans would likely lead to a substantial increase in the markets for storefront payday loans and storefront single-payment vehicle title loans. In the 2017 Final Rule, the Bureau analyzed how the adoption of State laws restricting payday lending in Colorado, Virginia, and Washington led to significant contraction in the number of payday stores. In those States, nearly all borrowers living in non-rural areas (MSAs) still had access to a bricks-and-mortar payday store. However, the Bureau noted that a substantial minority of borrowers living outside of MSAs no longer had a payday store readily available following the contraction in the industry. In Colorado, Virginia, and Washington, 37 percent, 13 percent, and 30 percent of borrowers, respectively, would need to travel at least five additional miles to reach a store that remained open. In Virginia, almost all borrowers had a store that remained open within 20 miles of their previous store. And, in Washington 9 percent of borrowers would have to travel at least 20 additional miles.[385]

While many borrowers who live outside of MSAs do travel that far to take out a payday loan, many do not. As such, the expected increase in bricks-and-mortar stores that would result from this proposal should improve access to storefront payday loans for those borrowers unwilling or unable to travel greater distances for these loans. While rural borrowers for whom

[385] 82 FR 54472, 54853.

visiting a storefront payday lender is impracticable under the 2017 Final Rule retain the option to seek covered short-term or longer-term balloon-payment loans from online lenders, restrictions imposed by State and local law may not allow this in some jurisdictions. Additionally, not all of these would-be borrowers necessarily have access to the internet, a necessity in order to originate online loans.[386] For those consumers who are unable or unwilling to seek loans from an online lender, the proposal would provide more, and potentially more desirable, borrowing options.

The Bureau expects that the relative impacts on rural and non-rural consumers of vehicle title loans would be similar to what would occur in the payday market. That is, rural consumers would be likely to experience a greater increase in the physical availability of single-payment vehicle title loans made through storefronts than borrowers living in non-rural areas.

Finally, the Bureau notes that it received a number of comments on the 2016 Proposal indicating that some online payday lenders operate in rural areas and comprise large shares of their local economies. Given that the proposal would allow these lenders to operate at their pre-2017 Final Rule capacities, it is likely that at least some rural lenders would be substantially and positively impacted by the proposal, benefiting their local economies.

Given the available evidence, the Bureau believes that, other than the relatively greater increase in the physical availability of covered short-term loans made through storefronts,

[386] In considering this in the 2017 Final Rule, the Bureau noted that "rural populations are less likely to have access to high-speed broadband compared to the overall population," but that "the bandwidth and speed required to access an online payday lender is minimal," and that "most potential borrowers in rural communities will likely be able to access the internet by some means (*e.g.*, dial up, or access at the public library or school)." 82 FR 54472, 54853. However, there are likely to be at least some rural borrowers that were displaced from the market by the 2017 Final Rule.

consumers living in rural areas would not experience substantially different effects of the proposal than other consumers.[387]

IX. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act[388] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996[389] (RFA) requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations.[390] The RFA defines a "small business" as a business that meets the size standard developed by the Small Business Administration pursuant to the Small Business Act.[391]

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[392] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to

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[387] In the 2017 Final Rule, the Bureau noted the potential for small effects on a few local labor markets in which online lenders comprise a significant share of employment. 82 FR 54472, 54853. Corresponding effects may result from this proposal as well. However, the specifics of these impacts would depend on the competitive characteristics of these labor markets (both as they currently exist and in the counterfactual) that are not easily discernable or generalizable, and are of a second-order concern relative to the more direct impacts noted above.

[388] Public Law 96-354, 94 Stat. 1164 (1980).

[389] Public Law 104-21, section 241, 110 Stat. 847, 864-65 (1996).

[390] 5 U.S.C. 601 through 612. The term "'small organization' means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes [an alternative definition under notice and comment]." 5 U.S.C. 601(4). The term "'small governmental jurisdiction' means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes [an alternative definition after notice and comment]." 5 U.S.C. 601(5).

[391] 5 U.S.C. 601(3). The Bureau may establish an alternative definition after consulting with the SBA and providing an opportunity for public comment. *Id.*

[392] 5 U.S.C. 601 through 612.

consult with small business representatives prior to proposing a rule for which an IRFA is required.[393]

As discussed above, this proposal would rescind the Mandatory Underwriting Provisions of the 2017 Final Rule. The section 1022(b)(2) analysis above describes how, if adopted, this proposal would reduce the costs and burdens on covered persons, including small entities, relative to a baseline where compliance with the 2017 Final Rule becomes mandatory. Additionally, the 2017 Final Rule's FRFA contains a discussion of the specific costs and burdens imposed by the 2017 Final Rule on small entities, including those imposed by the Mandatory Underwriting Provisions that this proposal would reverse.[394] In addition to the removal of costs and burdens, all operations under current law, as well as those that would be adopted if compliance with the Mandatory Underwriting Provisions becomes mandatory, would remain available to small entities should this proposal be adopted. Thus, a small entity that is in compliance with the law at such time when this proposal might be adopted would not need to take any additional action to remain in compliance. Based on these considerations, the proposed rule would not have a significant economic impact on any small entities.

Accordingly, the undersigned hereby certifies that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Thus, neither an IRFA nor a small business review panel is required for this proposal. The Bureau requests comments on this analysis and any relevant data.

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[393] 5 U.S.C. 609.

[394] 82 FR 54472, 54853.

X. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA),[395], Federal agencies are generally required to seek Office of Management and Budget (OMB) approval for information collection requirements prior to implementation. Under the PRA, the Bureau may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to an information collection unless the information collection displays a valid control number assigned by OMB. The collections of information related to the 2017 Final Rule were previously submitted to OMB in accordance with the PRA and assigned OMB Control Number 3170-0065 for tracking purposes, however this control number is not yet active as OMB has not approved these information collection requests. This proposed rule would substantially revise or remove several the information collection requests identified in the Bureau's previous submission.

A revised Supporting Statement detailing the changes to the information collections and their effects on the Rule's overall burden will be made available for public comment on the electronic docket accompanying this proposed rule, and submitted to OMB for approval at the final rulemaking stage.

Comments are specifically invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) the accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on

[395] 44 U.S.C. 3501 *et seq.*

these issues may be sent to the addresses identified in the ADDRESSES section above. All comments will become a matter of public record.

List of Subjects in 12 CFR Part 1041

Banks, Banking, Consumer protection, Credit, Credit Unions, National banks, Reporting and recordkeeping requirements, Savings associations, Trade practices.

Authority and Issuance

For the reasons set forth above, the Bureau proposes to amend 12 CFR Part 1041, as set forth below:

PART 1041—PAYDAY, VEHICLE TITLE, AND CERTAIN HIGH-COST INSTALLMENT LOANS

1. The authority citation for part 1041 continues to read as follows:

Authority: 12 U.S.C. 5511, 5512, 5514(b), 5531(b), (c), and (d), 5532.

SUBPART A—GENERAL

2. Amend § 1041.1 by removing the last sentence of paragraph (b).

3. Amend § 1041.2 by removing and reserving paragraphs (a)(14) and (19).

SUBPART B—[REMOVE AND RESERVE]

4. Remove and reserve Subpart B, consisting of §§ 1041.4 through 1041.6.

SUBPART D—RECORDKEEPING, ANTI-EVASION, AND SEVERABILITY

5. Amend the heading for Subpart D by removing "Information Furnishing".

6. Remove and reserve §§ 1041.10 and 1041.11.

7. Amend § 1041.12 by revising paragraph (b)(1) to read as follows, and by removing and reserving paragraphs (b)(2) and (3):

§ 1041.12 Compliance program and record retention.

* * * * *

(b) * * *

(1) *Retention of loan agreement for covered loans.* To comply with the requirements in this paragraph (b), a lender must retain or be able to reproduce an image of the loan agreement for each covered loan that the lender originates.

* * * * *

8. In Appendix A to part 1041, remove and reserve Model Forms A-1 and A-2.

9. In Supplement I to part 1041:

a. Under *Section 1041.2—Definitions,* revise *2(a)(5) Consummation* and remove *2(a)(19) Vehicle Security.*

b. Under *Section 1041.3—Scope of Coverage; Exclusions; Exemptions*, revise *3(e)(2) Borrowing History Condition* and *3(e)(3) Income Documentation Condition*.

c. Remove *Section 1041.4—Identification of Unfair and Abusive Practice*, *Section 1041.5—Ability-to-Repay Determination Required*, *Section 1041.6—Conditional Exemption for Certain Covered Short-Term Loans*, *Section 1041.10—Furnishing Information to Registered Information Systems*, and *Section 1041.11—Registered Information Systems*.

d. In *Section 1041.12—Compliance Program and Record Retention*:

i. Revise *12(a) Compliance Program* and *12(b) Record Retention*.

ii. Remove *12(b)(1) Retention of Loan Agreement and Documentation Obtained in Connection With Originating a Covered Short-Term or Covered Longer-Term Balloon-Payment Loan*, *12(b)(2) Electronic Records in Tabular Format Regarding Origination Calculations and Determinations for a Covered Short-Term or Longer-Term Balloon-Payment Loan Under § 1041.5*, *12(b)(3) Electronic Records in Tabular Format Regarding Type, Terms, and*

Performance of Covered Short-Term or Covered Longer-Term Balloon-Payment Loans, and *Paragraph 12(b)(3)(iv)*.

iii. Revise *12(b)(5) Electronic Records in Tabular Format Regarding Payment Practices for Covered Loans*.

The revisions read as follows:

Supplement I to Part 1041—Official Interpretations

Section 1041.2—Definitions

*   *   *   *   *

2(a)(5) Consummation

1. *New loan.* When a contractual obligation on the consumer's part is created is a matter to be determined under applicable law. A contractual commitment agreement, for example, that under applicable law binds the consumer to the loan terms would be consummation. Consummation, however, does not occur merely because the consumer has made some financial investment in the transaction (for example, by paying a non-refundable fee) unless applicable law holds otherwise.

*   *   *   *   *

Section 1041.3—Scope of Coverage; Exclusions; Exemptions

*   *   *   *   *

3(e) Alternative Loans

*   *   *   *   *

3(e)(2) Borrowing History Condition

1. *Relevant records.* A lender may make an alternative covered loan under § 1041.3(e) only if the lender determines from its records that the consumer's borrowing history on alternative covered loans made under § 1041.3(e) meets the criteria set forth in § 1041.3(e)(2).

The lender is not required to obtain information about a consumer's borrowing history from other persons, such as by obtaining a consumer report.

2. *Determining 180-day period.* For purposes of counting the number of loans made under § 1041.3(e)(2), the 180-day period begins on the date that is 180 days prior to the consummation date of the loan to be made under § 1041.3(e) and ends on the consummation date of such loan.

3. *Total number of loans made under § 1041.3(e)(2).* Section 1041.3(e)(2) excludes loans from the conditional exemption in § 1041.3(e) if the loan would result in the consumer being indebted on more than three outstanding loans made under § 1041.3(e) from the lender in any consecutive 180-day period. See § 1041.2(a)(17) for the definition of outstanding loan. Under § 1041.3(e)(2), the lender is required to determine from its records the consumer's borrowing history on alternative covered loans made under § 1041.3(e) by the lender. The lender must use this information about borrowing history to determine whether the loan would result in the consumer being indebted on more than three outstanding loans made under § 1041.3(e) from the lender in a consecutive 180-day period, determined in the manner described in comment 3(e)(2)-2. Section 1041.3(e) does not prevent lenders from making a covered loan subject to the requirements of this part.

4. *Example.* For example, assume that a lender seeks to make an alternative loan under § 1041.3(e) to a consumer and the loan does not qualify for the safe harbor under § 1041.3(e)(4). The lender checks its own records and determines that during the 180 days preceding the consummation date of the prospective loan, the consumer was indebted on two outstanding loans made under § 1041.3(e) from the lender. The loan, if made, would be the third loan made under § 1041.3(e) on which the consumer would be indebted during the 180-day period and, therefore,

would be exempt from this part under § 1041.3(e). If, however, the lender determined that the consumer was indebted on three outstanding loans under § 1041.3(e) from the lender during the 180 days preceding the consummation date of the prospective loan, the condition in § 1041.3(e)(2) would not be satisfied and the loan would not be an alternative loan subject to the exemption under § 1041.3(e) but would instead be a covered loan subject to the requirements of this part.

3(e)(3) Income Documentation Condition

1. *General.* Section 1041.3(e)(3) requires lenders to maintain policies and procedures for documenting proof of recurring income and to comply with those policies and procedures when making alternative loans under § 1041.3(e). For the purposes of § 1041.3(e)(3), lenders may establish any procedure for documenting recurring income that satisfies the lender's own underwriting obligations. For example, lenders may choose to use the procedure contained in the National Credit Union Administration's guidance at 12 CFR 701.21(c)(7)(iii) on Payday Alternative Loan programs recommending that Federal credit unions document consumer income by obtaining two recent paycheck stubs.

* * * * *

Section 1041.12—Compliance Program and Record Retention

12(a) Compliance Program

1. *General.* Section 1041.12(a) requires a lender making a covered loan to develop and follow written policies and procedures that are reasonably designed to ensure compliance with the applicable requirements in this part. These written policies and procedures must provide guidance to a lender's employees on how to comply with the requirements in this part. In particular, under § 1041.12(a), a lender must develop and follow detailed written policies and

procedures reasonably designed to achieve compliance, as applicable, with the payments requirements in §§ 1041.8 and 1041.9. The provisions and commentary in each section listed above provide guidance on what specific directions and other information a lender must include in its written policies and procedures.

12(b) Record Retention

1. *General.* Section 1041.12(b) requires a lender to retain various categories of documentation and information concerning payment practices in connection with covered loans. The items listed are non-exhaustive as to the records that may need to be retained as evidence of compliance with this part.

* * * * *

12(b)(5) Electronic Records in Tabular Format Regarding Payment Practices for Covered Loans

1. *Electronic records in tabular format.* Section 1041.12(b)(5) requires a lender to retain records regarding payment practices in electronic, tabular format. Tabular format means a format in which the individual data elements comprising the record can be transmitted, analyzed, and processed by a computer program, such as a widely used spreadsheet or database program. Data formats for image reproductions, such as PDF, and document formats used by word processing programs are not tabular formats.

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[THIS SIGNATURE PAGE PERTAINS TO THE PROPOSED RULE TITLED "PAYDAY, VEHICLE TITLE, AND CERTAIN HIGH-COST INSTALLMENT LOANS"]

Dated: 2/06/, 2019.

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