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December 13, 2018

VIA HAND DELIVERY

Brian Johnson, Acting Deputy Director
Office of the Director
Bureau of Consumer Financial Protection
1700 G Street N.W.
Washington, DC 20552

Dear Deputy Director Johnson:

Please find enclosed a petition for rulemaking and supplemental comments regarding the Bureau's Final Rule regulating Payday, Vehicle Title, And Certain High–Cost Installment Loans. The petition and comments request that the Bureau, as part of its currently pending reconsideration of that Rule, exempt debit card payments from the Rule's payment provisions. As the petition and comments explain, the decision to include debit card payments was unsupported and irrational, and that error should be addressed and corrected **at the same time that the Bureau reconsiders the Rule's ability-to-pay provisions** so as to ensure that there is a level playing field across these different segments of the consumer-lending industry.

I would be happy to discuss the petition and comments, and I thank you for your consideration.

Sincerely,

Andrew M. Grossman
Counsel to Advance Financial

Enclosure

Petition for Rulemaking and Supplementary Comment
From Advance Financial,
To the Bureau of Consumer Financial Protection

December 13, 2018

Docket No. CFPB-2016-0025

Filed via email to cfpb_reginquiries@cfpb.gov and
FederalRegisterComments@cfpb.gov and via Hand Delivery to:

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I. Introduction and Summary

Pursuant to the First Amendment to the United States Constitution and 5 U.S.C. § 553(e), Advance Financial hereby petitions and submits these supplemental comments to the Bureau of Consumer Financial Protection to amend its Final Rule regulating Payday, Vehicle Title, And Certain High–Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017), to exempt debit card transactions from provisions regulating payment transfers.

The Final Rule brushed aside recommendations by the Small Business Review Panel, 18 state attorneys general, and numerous small business representatives, credit unions, community banks, and other industry participants to exclude debit card transactions from the Final Rule's payment provisions. Instead, the Final Rule treated them the same as check and ACH payments, despite recognizing that denied debit card payments do not present the very risk of consumer harm that the Bureau relied upon as the basis for the payment provisions because debit card payments rarely (if ever) result in consumers being charged insufficient funds fees. That decision was completely unsupported and, in fact, conflicts with substantial record evidence demonstrating the benefits to consumers of debit card repayment.

Perversely, by treating debit card payments the same as ACH and check payments, the Final Rule reduces incentives for lenders to allow consumers to use the most popular payment method that typically avoids the precise consumer harm that the Bureau sought to address with the payment provisions: mounting insufficient funds fees.

The Final Rule's error in failing to exclude debit card payments from its payment provisions needs to be corrected now in conjunction with the Bureau's reconsideration of the Final Rule's ability-to-pay provisions. The current state of regulatory uncertainty is causing lenders to evaluate whether longer-term, multi-payment transactions and allowing repayment by debit card make sense. A reconsideration process that provides regulatory relief only on the ability-to-repay issue will actually limit consumers' ability to choose longer-term credit products with more affordable installments that avoid balloon payments and to employ a payment method that avoids mounting insufficient funds fees. By contrast, acting now, in concert with reconsideration of the ability-to-pay provisions, would promote more affordable credit options and the use of debit card payments limiting consumer's exposure to costly fees. In this respect, excluding debit card payments from the Final Rule's payment provisions goes hand-in-hand with the Bureau's reconsideration of the ability-to-pay provisions.

Accordingly, the Petitioner respectfully requests that the Bureau amend the Final Rule to exclude debit card payments and that it do so in conjunction with its reconsideration of the Final Rule's ability-to-pay provisions.

II. Legal Background

The Bureau is responsible for "regulat[ing] the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491. As relevant here, Section 1031 of the Dodd-Frank Act authorizes the Bureau to exercise rulemaking authority "to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law 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." 12 U.S.C. § 5531(a); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1031(a), 124 Stat. 1376, 2005.

The statute defines an "unfair" or "abusive" act or practice. An "unfair" act or practice is "likely to cause substantial injury to consumers which is not reasonably avoidable by consumers" and "not outweighed by countervailing benefits to consumers or to competition." 12 U.S.C. § 5531(c). An "abusive" act or practice is one that "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service" or "takes unreasonable advantage of" the consumer's ignorance of material terms or conditions, the consumer's inability to protect his own interests, or the consumer's reasonable reliance that the lender is acting in his best interest. *Id.* § 5531(d). If an act or practice is identified as unfair, deceptive, or abusive, then the Bureau has the authority to "prescribe rules" preventing such acts or practices. *Id.* § 5531(b). Thus, to regulate an act or practice, the Bureau must find that it is unfair or abusive. Absent such a finding, the Bureau has no basis or authority to regulate.

In November 2017, the Bureau identified what it deemed three unfair and abusive practices, one of which is relevant to this comment and rulemaking petition. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017) (codified at 12 C.F.R. pt. 1041). After making its findings, the Bureau issued a rule (the "Final Rule") prescribing those practices. The Final Rule includes three main sections, which have been referred to as the "ability-to-pay" provisions, the "payment" provisions, and the "notice" provisions. This petition and comment addresses only one aspect of the Final Rule's payment provisions that is unsupported by the requisite finding of unfairness or abusiveness and, in fact, discourages use of a payment method that can help consumers avoid the very unfair and abusive element of other payment methods the Bureau sought to curtail.

The Bureau claimed authority to promulgate the payment provisions based on the following finding:

> It is an unfair and abusive practice for a lender to make attempts to withdraw payment from consumers' accounts in connection with a covered loan after the lender's second consecutive attempts to withdraw payments from the accounts from which the prior attempts were made have failed due to a lack of sufficient funds, unless the lender obtains the consumers' new and specific authorization to make further withdrawals from the accounts.

12 C.F.R. § 1041.7 (2018). To prevent that practice, the Bureau issued a rule that prohibits lenders from "initiat[ing] a payment transfer from a consumer's account in connection with any covered loan that the consumer has with the lender after the lender has attempted to initiate two consecutive failed payment transfers from that account in connection with any covered loan that the consumer has with the lender." *Id.* § 1041.8 (b)(1).

The regulation defines a "payment transfer" as "any lender-initiated debit or withdrawal of funds from a consumer's account for the purpose of collecting any amount due or purported to be due in connection with a covered loan." *Id.* § 1041.8(a)(1). In its official interpretations of the Final Rule, the Bureau clarified that the definition of "payment transfer" means, among other payment methods, "[a]ny electronic fund transfer meeting the general definition in § 1041.8(a)(1)…, including but not limited to an electronic fund transfer initiated by a debit card or a prepaid card." 82 Fed. Reg. at 54,910. As a result, the payment provisions generally apply, on equal terms, transactions involving checks, ACH transfers, and debit or prepaid cards.

In the notice and comment period, industry members expressed their concern that the definition of payment transfer was insupportably overbroad. They argued that, although the Bureau's finding may support regulation of payments through such means as checks or ACH transfers where a denied payment can and likely would result in overdrafts and insufficient fund fees, that rationale does not extend to payments made through debit cards. Unlike a check or ACH transfer, a denied debit card transaction generally does not incur denial fees or result in an overdraft—instead, the payment is simply denied. Accordingly, they argued, subjecting debit card payments to the payment provisions was unsupported, unnecessary, and therefore arbitrary and capricious. As the Bureau explained in the Final Rule's preamble:

> During the SBREFA process and in outreach with industry in developing the proposal, some lenders

recommended that the Bureau take a narrower approach in connection with payment attempts by debit cards. One such recommendation suggested that the prohibition against additional withdrawal attempts should not apply when neither the lender nor the consumer's account-holding institution charges an NSF fee in connection with a second failed payment attempt involving a debit card transaction that is declined. As explained in the proposal, the Bureau understood that depository institutions generally do not charge consumers NSF fees or declined authorization fees for such transactions, although it was aware that such fees are charged by some issuers of prepaid cards. It thus recognized that debit card transactions present somewhat less risk of harm to consumers.

For a number of reasons, however, the Bureau did not believe that this potential effect was sufficient to propose excluding such transactions from the rule. First, the recommended approach would not protect consumers from the risk of incurring an overdraft fee in connection with the lender's third withdrawal attempt. As discussed in Market Concerns—Payments, the Bureau's research focusing on online lenders' attempts to collect covered loan payments through the ACH system indicates that, in the small fraction of cases in which a lender's third attempt succeeds—i.e., after the lender has sufficient information indicating that the account is severely distressed—up to one-third of the successful attempts are paid out of overdraft coverage. Second, the Bureau believed that the recommended approach would be impracticable to comply with and enforce, as the lender initiating a payment transfer would not necessarily know the receiving account-holding institution's practice with respect to charging fees on declined or returned transactions. Additionally, the Bureau was concerned that lenders might respond to such an approach by seeking to evade the rule by re-characterizing their fees in some other manner. It thus believed that it was not appropriate to propose that

> payment withdrawal attempts by debit cards or prepaid cards be carved out of the rule, in light of the narrow range of those situations, the administrative challenges, and the residual risk to consumers.

Id. at 54,750.

The concerns raised by industry leaders were shared by many state law-enforcement officers responsible for policing unfair and abusive financial practices within their states. In particular, the Attorneys General of Arkansas, South Carolina, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Nebraska, Nevada, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin stated in their joint comments to the Bureau:

> The Proposed Rule should likewise be revised to incorporate industry's suggestions that the prohibition against repeated presentments not apply to debit card transactions. The Proposed Rule purports to justify imposing a two transaction limit on the grounds that repeated presentments result in repeated non-sufficient funds fees. *See* 81 FR 47929/3 ("Bounced checks and failed [automated transaction] payments can be quite costly for borrowers. The median bank NSF fee is $34[.]"); 81 FR 48049/2 (similar); 81 FR 48057/2 (contending restriction is necessary because NSF fees can quickly diminish consumer deposits); *see also* 81 FR 47934/1 (discussing NSF fees and arguing they aggravate risks associated with payday loans). Yet as previous commenters have observed—and the Proposed Rule concedes—those concerns do not apply to the overwhelming majority of debit card transactions because "depository institutions generally do not charge consumers a [non-sufficient funds] fee or declined authorization fees for declined debit card transactions." 81 FR 48066/1. And in declining to create an exemption, the Proposed Rule merely argues

> that "it is not appropriate to propose carving out of the rule payment withdrawal attempts by debit cards... given the narrow circumstances in which the carve-out would apply, administrative challenges, and residual risks to consumers." 81 FR 48066/2; *see also* 81 FR 48066/1. Thus, in other words, the Proposed Rule failed to incorporate a justifiable exemption because it would be narrow- which is often true of exemptions- and would require the CFPB Director to do extra work. Those factors hardly justify failing to create an exemption, and accordingly, the Proposed Rule should be revised.

Comment of Attorneys General of Arkansas, South Carolina, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Nebraska, Nevada, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin, Docket No. CFPB-2016-0025, Oct. 7, 2016, at 20–21. The Bureau acknowledged the comment, stating that, "[s]everal commenters, including State Attorneys General, argued that payments made using debit cards should be exempt because they generally do not engender NSF fees, and thus, the harm justifying the identified unfair and abusive act or practice is diminished for debit card payments." 82 Fed. Reg. at 54,746.

The Bureau acknowledged that a denied debit card transaction generally does not create "NSF [Not Sufficient Funds], overdraft, return payment fees, or similar fees, and [would] not close accounts because of failed payment attempts," and thus *"the harms underpinning the unfair and abusive practice...would not occur." Id.* (emphasis added). The Bureau even conceded that "the rule does not need to cover those instances." *Id.* Yet despite recognizing that debit card payments are unlike check or ACH transfers, would not cause the unfair or abusive harms identified as the basis for the payment provisions, and do not need to be covered by the Final Rule, the Bureau arbitrarily and inexplicably applied the new restrictions to debit cards:

> [T]he Bureau has decided not to exempt payments made using debit cards from the rule. First, while failed debt card transactions may not trigger NSF fees, some of them do trigger overdraft fees, even after two failed attempts, as our study showed. Second, lenders may still charge return fees for each presentment. And third, the Bureau does not believe an exclusion based on payment type would work to alleviate much compliance burden associated with § 1041.8 because the lender would need to develop processes and procedures for those payment types that are covered regardless. In fact, juggling multiple, disparate processes and procedures depending on payment type would involve its own compliance burdens.

Id. at 54,747.

The Final Rule provided that the payment provisions at issue here would go into force on August 19, 2019.[1] *Id.* at 54,472. In November 2018, however, a federal court indefinitely stayed the compliance date pending further order. Order, *Community Financial Services Association of America, Ltd. et al., v. Consumer Financial Protection Bureau et al.*, 2018 WL 3491029 (W.D. Tex.) (Nov. 6, 2018).

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[1] All of the provisions of the Final Rule initially had a compliance date of August 19, 2019, except for three provisions: Section 1041.1 (authority and purpose), Section 1041.11 (registered information systems), and Section 1041.14 (severability).

Shortly before the compliance date was stayed, the Bureau indicated that it was reconsidering the scope of the Final Rule. It issued a statement providing that it was "planning to propose revisiting only the ability-to-repay provisions and not the payments provisions, in significant part because the ability-to-repay provisions have much greater consequences for both consumers and industry than the payment provisions." Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date, Consumer Financial Protection Bureau, October 26, 2018. The Bureau has subsequently suggested that it may revisit the Final Rule's payment provisions in a subsequent proposal.

III. The Bureau Should Exclude Debit Cards from the Final Rule

The Bureau should exclude debit cards from the payment provisions in the Final Rule because the decision to include debit cards was arbitrary and capricious, contrary to law, and in excess of the Bureau's authority. *See* 5 U.S.C. § 706(2). The Bureau's rulemaking authority is limited to regulating acts and practices that are unfair or abusive. Unlike other payment types subject to the Final Rule, such as ACH and check transfers, debit card transactions do not pose any risk of likely substantial injury to consumers, as the Bureau itself acknowledged. Even assuming *arguendo* that debit cards could pose a substantial risk of harm, their benefits to consumers outweigh the potential harm. And, as a procedural matter, it would be easy for the Bureau to exclude debit card transactions from the payment provisions: the existing rulemaking record supports that result, and all that is required is a single, one-sentence amendment modeled on the exemption in Section 1041.8(a)(1)(ii) for certain account-holding institutions.

A. Debit Card Transactions Are Unlike ACH and Check Transfers

The Bureau's regulatory authority under Dodd-Frank is limited to making rules that prescribe acts or practices that are unfair or abusive. *See* 12 U.S.C. § 5531(a). In identifying its basis for exercising regulatory authority, the Bureau found that it is an unfair and abusive practice for a lender to make more than two consecutive attempts to withdraw funds from accounts when the withdrawal attempt was denied for lack of sufficient funds, unless the lender obtains the consumers' new and specific authorization to make further withdrawals from the accounts. 12 C.F.R. § 1041.7 (2018).

The stated rationale for this prohibition was that "each additional attempt by the lender is *likely to trigger substantial additional fees* for the consumer but is unlikely to result in successful collection for the lender. These additional attempts can cause serious injury to consumers who are already in substantial financial distress, including the cumulative fees." Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. at 54,733 (emphasis added). The Bureau studied ACH transfers and found that consumers may incur up to $100 in NSF fees from their account-holding institution after just two failed attempts to withdraw funds, which injures consumers who then incur substantial fees without having completed the original payment. *Id.* Thus, to prevent what it identified as an unfair and abusive lending practice for ACH transfers, the Bureau prohibited lenders from initiating a payment transfer after two consecutive failed attempts for ACH transfers, checks, and debit card payments. 12 C.F.R. § 1041.8(b). The stated purpose was to prevent consumers from being subjected, without their additional express authorization, to excessive fees from their account-holding institution for denied transactions after successive attempted withdrawals.

The problem with this approach is that it applies too broadly because of how the Bureau defined payment transfer. *Id.* § 1041.8(a)(1). In the definition of a payment transfer, the Bureau included debit or withdrawal payments initiated through check, ACH, *and debit card. Id.* Based on the Bureau's own stated purpose for the payment limitations, that definition arbitrarily includes a payment method that is neither unfair nor abusive—namely, debit card transactions, which are unlike ACH and check payment transfers. Although check and ACH transfers typically cause consumers to incur fees from multiple failed attempts to withdraw funds, debit card payments rarely (if ever) result in such fees from their account-holding institutions. As the Bureau itself has recognized,

> Generally, if you overdraw your checking account by a check or ACH, your bank or credit union's overdraft program will pay for the transaction and charge you a fee. By allowing your account balance to fall below $0, your bank or credit union will also effectively take the repayment right out of your next deposit. At most institutions, the overdraft fee is a fixed amount regardless of the transaction amount, and you can incur several overdraft fees in a single day.... Overdraft fees work a little differently for debit cards. Your bank or credit union cannot charge you fees for overdrafts on

ATM and most debit card transactions unless you have agreed ("opted in") to these fees.

Gary Stein, *Understanding the Overdraft "Opt-in" Choice*, Consumer Financial Protection Bureau (January 19, 2017)[2]; *see also* Requirements for Overdraft Services, 12 C.F.R. § 1005.17. Because the rationale and statutory justification for the payment provisions was to prevent excessive fees likely to be incurred by consumers from failed payment attempts, the decision to include debit cards was arbitrary—indeed, that decision conflicts with the Bureau's stated rationale. And in arbitrarily including debit cards in the Final Rule, the Bureau exceeded its statutory authority to regulate and the Administrative Procedure Act's requirement for reasoned rulemaking.

The Bureau implicitly acknowledged this to be true when it distinguished ACH transactions from debit card transactions. As the Bureau recognized in its study, "Fees on [ACH] transactions are not subject to an opt-in requirement like overdraft fees on debit card transactions, meaning that while it is true borrowers may have opted into overdraft fees for some instances, that is not true for many instances in which overdraft fees are incurred." 82 Fed. Reg. at 54,735. The Bureau further reiterated that "account-holding institution[s] may not charge a fee [on] attempts made by debit cards and certain prepaid cards." *Id.* at 54,734.

Simply put, when a lender attempts to deposit a check or initiate an ACH transfer and the consumer's balance is insufficient, the consumer's bank

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[2] *Available at* https://www.consumerfinance.gov/about-us/blog/understanding-overdraft-opt-choice.

typically charges an NSF fee, and the lender may charge an NSF fee, as well. In contrast, when a lender tries to initiate payment through a debit card, the bank will typically either accept or decline the authorization request, without imposing any fee when the request is denied for insufficient funds. Unlike with checks and ACH transfers, overdrafts or overdraft fees are permitted only when account-holders have specifically and voluntarily authorized overdraft protection, *see* 12 C.F.R. § 1005.17, which (as the Bureau found) most have not, *see* 82 Fed. Reg. at 54,750/3. Furthermore, unlike with check and ACH payments, lenders do not charge fees for denied debit card payments. In fact, state laws permitting fees for insufficient funds generally do not even apply to denied debit card payments. So while borrowers may face the risk of mounting NSF fees from both the borrower's account-holding institution and the lender with check or ACH payments, debit card payments do not pose that risk.

In short, the rationale relied upon in the Final Rule to regulate other forms of payment does not extend to debit card payments. The Final Rule failed to identify any basis to conclude otherwise, arbitrarily relying on ACH-transaction data and ignoring that consumers who may be subject to fees because of a denied debit card payment affirmatively consented to them and have the absolute right to revoke such consent. *Id.* at 54,847 (providing the Bureau's analysis of ACH data). The rules and restrictions applicable to debit card payments already place strong protections on any fees associated with overdrafts. Arbitrarily lumping debit card payments in with checks and ACH transfers results in heavier burdens on debit card payments and thereby disincentivizes lenders from using a payment method that has more protections and is less costly to consumers. That is illogical and contrary to the stated purpose of the payment provisions.

B. The Finding of Substantial Harm to Consumers Is Unsupported

For the Bureau to exercise regulatory authority, it must also show that an act or practice will substantially injure a consumer, materially interfere with a consumer's ability to understand the product or service, or unreasonably take advantage of a consumer. 12 U.S.C. § 5531(c)–(d). Absent such a showing, the Bureau is prohibited from regulating.

The Bureau should exclude debit card transactions from the Final Rule's payment provisions because there has been no finding of harm or even evidence to support such a finding with respect to such transactions and any implied finding of harm would be insufficient to justify the exercise of regulatory authority. As explained above, the Final Rule's rationale for regulating payments was to protect consumers from the harms of excessive fees based on insufficient funds. But unlike checks and ACH debits, debit card transactions do not pose such risks. If the account lacks adequate funds to cover the debit, the transaction is simply denied. Likewise, lenders offering covered loans subject to the Final Rule do not charge NSF fees for debit card transactions. Only when a consumer has expressly chosen to obtain overdraft coverage is a bank fee even possible, and as the Bureau has acknowledged, the vast majority of consumers do not make such an election. For the few who have specifically and voluntarily elected to have overdraft protection, they do so specifically to obtain the protections it provides.

Furthermore, the Bureau inexplicably relied on an examination of ACH transfer data in determining that consumers needed to be protected from mounting NSF fees following a second consecutive failed payment attempt. The Bureau did not examine similar debit card payment data. Reviewing such data would have revealed that consumers are rarely charged overdraft fees by their financial institutions for denied debit card payments, that state laws generally do not authorize lenders to charge NSF fees for denied debit card payments, that debit card rules may prohibit the charging of such fees, and that lenders of "covered loans" rarely, if ever, charge a fee for a denied debit card payment. Including debit card payments in the payment provisions is attempting to solve a problem that does not exist and, in doing so, actually harms consumers.

The State Attorneys General correctly identified the lack of evidentiary support for the decision to include debit card transactions. As their comment described, "the Proposed Rule concedes [that] those concerns do not apply to the overwhelming majority of debit card transactions because 'depository institutions generally do not charge consumers a [NSF] fee or declined authorization fees for declined debit card transactions.'" Comment from State Attorneys General, *supra*, at 21.

Other commenters identified the Bureau's lack of evidentiary support for its decision to include debit card transactions. For example, one industry participant noted that "the CFPB has shown no research indicating consumers incur a disproportionate number of insufficient funds fees from covered loan products...Furthermore, debit card payments and other forms of payment which do not result in the consumer incurring fees should certainly not be subject to this proposal." Comment on the Proposed Payday Rule from Checkmate at 7 (Oct. 7, 2016). Likewise, another comment by an industry participant observed that the Bureau "does not take into account that other market alternatives to ACH or RCC payments, such as debit card authorizations, do not cause NSF fees" and "fails to account for the fact that overdraft fees will only occur if the consumer has voluntarily elected for overdraft protection at their financial institution." Comment from Check Into Cash, Inc. on the Proposed Payday Rule (Oct. 4, 2016).

In short, the Bureau relied on inapplicable data, arbitrarily failed to consider the material ways in which debit card transactions differ from other payment mechanisms, and failed to identify any evidence supporting a finding that debit card transactions likely impose substantial harm on consumers. In fact, the Bureau acknowledged that debit card payments are *not likely* to impose substantial harm on consumers. Accordingly, the decision to include debit cards in the payment provisions was arbitrary.

C. The Final Rule's Asserted Compliance and Enforcement Challenges Are Illusory

The Bureau stated in the Final Rule that it "decided not to exempt payments made using debit cards from the rule" because it did "not believe an exclusion based on payment type would work to alleviate much compliance burden associated with § 1041.8." 82 Fed. Reg. at 54,747. It concluded that the compliance burden would exist regardless "because the lender would need to develop processes and procedures for those payment types that are covered regardless. In fact, juggling multiple, disparate processes and procedures depending on payment type would involve its own compliance burdens." *Id.*

The Bureau's claims that excluding debit card payments would not "alleviate much compliance burden" and could even increase compliance costs were completely unsupported and are contrary to information provided by industry and plain common sense—after all, alternative means of collection, such as litigation, obviously impose far greater costs. And the unsupported assertion that an exclusion would increase compliance burdens by requiring lenders to "juggl[e] multiple, disparate processes and procedures depending on payment type" ignores that different payment types are already subject to different compliance regimes and that lenders, as a result, already are forced to employ "multiple, disparate processes and procedures depending on payment type." Given that reality, an exclusion could only reduce compliance burden. And the magnitude of that reduction would be significant, in light of the Final Rule's burdens. The payment provisions will significantly increase compliance costs on all payment transfer methods—specifically in terms of notifications, communications, and litigation. If debit card payments are excluded from the payment provisions, then lenders will be able to limit the increase in compliance costs associated with check and ACH transfer payments.

Likewise, the Final Rule's bare assertions of unidentified "administrative challenges" and enforcement challenges find no record support and ignore the pervasive regulation, at the state and federal levels, of debit card networks and transactions. As the State Attorneys General observed,

> in declining to create an exemption, the Proposed Rule merely argues that 'it is not appropriate to propose carving out of the rule payment withdrawal attempts by debit cards…given the narrow circumstances in which the carve-out would apply, administrative challenges, and residual risks to consumers.' Thus, in other words, the Proposed Rule failed to incorporate a justifiable exemption because it would be narrow—which is often true of exemptions—and would require the CFPB Director to do extra work. Those factors hardly justify failing to create an exemption, and accordingly, the Proposed Rule should be revised.

Comment from State Attorneys General, *supra*, at 21 (citations omitted). The Bureau oddly argues that an exemption for debit card payments is not warranted because it would apply only in "narrow circumstances." But the fact that debit card payments rarely (if ever) incur any NSF fees is reason enough to exempt them from the definition of payment transfer in the first place. Further, it defies logic to suggest that debit card payments are not a significant enough issue to create an exemption. That is the entire point of the comment from the State Attorneys General: debit card payments do not cause the harms the rule intends to cure (excessive NSF fees) and so regulating them will increase administrative burdens for lenders and impose risks and higher costs on consumers, without any countervailing benefit.

Industry members agreed:

> Given that FFA members offer their consumers various options to repay their transactions, some of which

> include debits from their bank accounts using debit cards, we encourage the CFPB to...reconsider its approach to debit cards. Debit cards are rejected by the banking system when consumers do not have sufficient funds in their account. So NSF fees do not arise. Use of the debit cards networks is widely understood by regulators, and the CFPB polices that industry well. Thus, *enforcement challenges should not exist.*

Comment on the Payday Rule from the Flexible Finance Association at 26 (Oct. 6, 2016) (emphasis added).

Furthermore, the Bureau's claim that including debit cards is justified because "a single definition is a simpler approach" and "more administrable as a practical matter" is unsupported and illogical. Exempting debit card transactions would create no compliance burden, and there is no record evidence to the contrary. Indeed, such an exemption would be more easily administrable than the exclusion provided in Section 1041.8(a)(1)(ii), which creates a *conditional* exclusion for certain transfers by account-holding institutions. By definition, a *conditional* exclusion is more complicated and burdensome to apply than a straightforward *categorical* exclusion, such as for debit card transactions. Moreover, it is completely arbitrary and illogical to acknowledge debit card transactions are unlike ACH and check transfers but then persist in regulating debit card payments just to have a "single definition" when the regulation (because of the existing exclusion) already abandoned the idea of employing a "single definition."

D. The Final Rule's Regulation of Debit Card Transactions Actually Injures Consumers

The Bureau's authority to regulate is further limited by the statutory requirement that even a substantially harmful act or practice is permitted if the countervailing benefits to consumers or competition outweigh the harm. 12 U.S.C. § 5531(c). Likewise, the Bureau is obligated to consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule." 12 U.S.C. § 5512(b)(2)(A)(i). For the reasons stated in Section III (A)–(B), *supra*, debit card repayment does not cause substantial harm to consumers. But even if such harm existed, it is outweighed by the countervailing benefit of access to (1) a form of repayment that is unlikely to subject consumers to the kind of mounting NSF fees the Bureau cites as unfair and abusive and (2) more flexible longer-term loans that employ debit card payment options. The Bureau's consideration of only (purported) costs, while ignoring these benefits, is the height of irrationality.

The chief consequence of including debit card payments in the payment provisions is to disincentivize lenders from promoting or allowing such payments. Processing debit card payments is costlier to lenders than processing ACH transfers and presenting checks. As mentioned above, debit card payments are already subject to numerous restrictions, and arbitrarily placing the payment provision limitations on debit card payments creates an even heavier burden on such payments. To save on costs, lenders are likely to rely more heavily on ACH transfers and checks, which will in turn cause consumers to incur more NSF fees. Furthermore, lenders will be more apt to charge NSF fees on ACH transfers and checks to cover the costs associated with the Final Rule. The Bureau has always promoted giving consumers as many payment options as possible, but the Final Rule works against that goal. The Final Rule should encourage the use of payment methods like debit cards, which do not result in NSF fees, rather than discourage such payments in favor of other payment methods that do.

In addition to increasing NSF fees, the Final Rule's treatment of debit card payment will also increase borrowing-related expenses for consumers. If lenders are unable to complete debit card payment transactions, the result in many cases will be for the loan to go into default. That, in itself, causes injury to the consumer's credit, increasing the likelihood that the consumer remains in the subprime credit market. Defaulted payments will result in more interest being charged on larger principal balances. Additional defaults and limited repayment options for lenders will result in significantly more collection lawsuits, which will increase the consumer's cost of credit through attorney fees, pre- and post-judgment interest, and other costs. Lenders will be forced to obtain more collection judgments resulting in disruptive wage garnishments. Thus, collection-related expenses will increase for both the lender and borrower. These can be substantial on both sides but are particularly harmful for consumers. *See, e.g.*, Comment on the Payday Rule from the Center for Responsible Lending Consumer Federation of America National Consumer Law Center, et al., at 20 (Oct. 7, 2016).

Debit card repayment is essential to the provision of longer-term and more flexible credit products that provide an alternative to single-payment balloon loans. Debit card repayment authorization facilitates longer-term loans, providing vital security for such lending. This includes installment loans, revolving loans and lines of credit, and a variety of other credit products that provide consumers with flexibility, typically lower annual percentage rates, and generally lower scheduled payments than single-payment balloon loans. Single-payment loans do not typically rely on debit card repayment and would not be impacted by the payment provision because lenders offering such loans are already required to obtain a new payment authorization for each new loan transaction.

Accordingly, one consequence of regulating debit card repayment is to increase the cost and reduce the availability of longer-term credit products and thereby channel more consumers into the very kind of single-payment balloon loans that the Bureau has identified as posing special risk of harm to consumers. Without the security of debit card repayment, longer-term lenders will be less able to extend credit to many consumers or will be forced to do so at higher rates or by charging higher fees in light of the increased risk and costs of such lending. Higher borrowing costs are, of course, detrimental to consumers.

In these respects, the Final Rule's treatment of debit card repayment is nonsensical: it purports to fix a "harm" to consumers for which there is no evidence with a solution for which there is substantial, documented evidence of potential consumer harm. That is completely contrary to the Final Rule's stated purpose and goals.

E. The Choice of a Few Consumers To Opt in to Overdraft Protection for Debit Card Transactions Does Not Justify the Final Rule's Approach

The Final Rule's treatment of debit card payments implicitly assumes that those relatively few consumers who have affirmatively chosen to add overdraft protection to accounts accessed through debit card transactions have made a harmful decision or are likely at risk to unfair or abusive fees. That assumption is unsupported and contrary to the record. There is no risk of mounting excessive fees but rather only the "narrow circumstance" of limited overdraft fees from the consumer's bank—which the consumer affirmatively elected as a protection.

As described above, overdrafts or overdraft fees on debit card transactions are rare and permitted only when the account-holder has specifically and voluntarily authorized overdraft protection. 12 C.F.R. § 1005.17. Such consent must be affirmative, and it must be informed: regulations require a financial institution, when seeking such consent, to "[p]rovide[] the consumer with a notice in writing, or if the consumer agrees, electronically, segregated from all other information, describing the institution's overdraft service." *Id.* at § 1005.17(b)(1)(i). Moreover, the contents and form of the notice are also prescribed by regulation. *Id.* at § 1005.17(d). When account-holders consent to overdraft protection for debit card transactions, they are fully informed of the costs and benefits of that service. And they may revoke that consent at any time, effective immediately. *Id.* at § 1005.17(f)–(g).

The evidence shows that consumers choose to opt-in to overdraft protection on debit card payments because it provides them with a safe and reputable method for accessing credit. Indeed, Professor Todd Zywicki found that "[t]here is no evidence that those who use overdraft protection are unaware of the cost or otherwise use overdraft protection foolishly or unknowingly." Todd J. Zywicki, *The Economics and Regulation of Bank Overdraft Protection*, 69 Wash. & Lee L. Rev. 1141, 1141 (2012).

Including debit card payment in the payment provisions would require customers in certain circumstances to essentially "opt-in" a second time to take advantage of a protection they specifically and voluntarily have already chosen. The few consumers who affirmatively elect this service do so because they appreciate its benefits and expect that it will provide them the service of covering payments owed rather than defaulting on them.

In short, the Final Rule's implicit judgment on consumers' decision to opt in to overdraft protection

> runs contrary to [Former] CFPB Director Richard Cordray's own testimony to the U.S. House Financial Services Committee in March 2012 regarding the purpose and intent of the Bureau, where he stated: 'People can make their own decisions, and nobody can or should try to do that for them...[I]t is the American way for responsible businesses to be straightforward and upfront with their customers, giving them all the information they need to make informed decisions.'

Comment from Check Into Cash, Inc., *supra*, at 8.

IV. The Bureau Should Act Now

Given the lack of record support for the Final Rule's decision to include debit card payments, the strong basis to exclude them, and the harm to consumers from the Final Rule's approach, the Bureau would be well justified in reversing that decision. It should do so now, to end the uncertainty facing lenders and thereby prevent serious harm to consumers. The present record is more than adequate to conclude that the Final Rule's approach to debit card payments lacks support and imposes unjustified burdens on both lenders and consumers. That exposes the Bureau to substantial legal risk, given the lack of support for the Final Rule's arbitrary treatment of debit card payments. Thus, the Bureau should promptly modify the definition of payment transfer to exclude debit card payments.

A. The Failure to Exclude Debit Card Payments Is Harming Consumers

The Bureau has suggested that it may reconsider the Final Rule's payment provisions in the future, after it reconsiders the Rule's ability-to-pay provisions. The delay inherent in that plan, however, will cause needless harm to consumers, because the uncertainty stemming from the Final Rule's status threatens consumers now. The small change requested in this petition and comment would suffice to ameliorate much of that harm.

Lenders offering longer-term covered loans (which are disproportionally impacted by the payment provisions) face substantial uncertainty at this time. It is difficult to evaluate the credit risks and pricing for longer-term loans when the rules to which those loans will be subject in the future are in a state of flux. That uncertainty is especially damaging because it concerns the core matter of repayment, the central source of risk in every loan. The viability of many longer-term loans turns on whether lenders will have recourse to debit card repayment in the future, as protection against default and the high costs of collection, including litigation. To be clear, the availability of debit card repayment free from the kind of regulation imposed by the Final Rule can and does often make the difference between extending credit to a consumer and denying it as too risky.

Yet lenders have no assurance at this time that they will be able to take advantage of debit card repayment for the loans that consumers are requesting today. The Final Rule, which is still on the books, severely limits the use of debit card repayment in ways that materially undermine the security necessary to extend credit. The district court's stay of the Final Rule may have been premised largely on challenges to the Rule's ability-to-pay provisions and so may or may not continue in force during and after the conclusion of the Bureau's reconsideration of those provisions. An additional reconsideration to address the Rule's payment provisions has not yet been formally announced and is uncertain with respect to its timing and focus. In the face of all these uncertainties, a prudent lender has no choice but to manage risk by limiting the availability of credit and increasing the cost of credit.

And that, in turn, causes all of the harms identified above. It denies consumers access to forms of payment that avoid NSF fees. It limits access to longer-term more flexible credit products and, as a result, increases the likelihood that consumers will be forced to resort to obtaining single-payment balloon loans. It increases consumers' borrowing costs. And it may restrict their access to credit altogether. What it does not do is reduce consumers' need for credit—that remains exactly the same, left to be satisfied in ways that involve higher costs and burdens for consumers. In this way, the present uncertainty faced by longer-term lenders exacerbates the ills that the Final Rule sought to address.

The Bureau can easily and timely put an end to this harm to consumers by implementing the change requested in this petition and comment as part of its initial reconsideration of the Final Rule. As described above, the existing rulemaking record already supports that change; the issues and evidence to be considered are manageable, given the Final Rule's lack of support for its approach; and the change goes hand-in-hand with the Bureau's reconsideration of the ability-to-pay provisions, which may reduce regulatory burdens on payday and other short-term lenders at the same time that longer-term lenders are subject to this needless uncertainty. Delaying would distort the market, by continuing disproportionate burdens on longer-term credit products. By contrast, acting now, in concert with reconsideration of the ability-to-pay provisions, would promote a level playing field across these different segments of the consumer-lending industry at the precise time when that is especially needed.

B. Failure to Exclude Debit Cards Exposes the Bureau to Serious Litigation Risk

The Bureau faces the substantial likelihood of a legal defeat that would undermine the operation of the Final Rule if it does not exclude electronic funds transfers initiated by a debit card or prepaid card from the definition of payment transfer. This outcome would be a self-inflicted wound entirely of the Bureau's making, as the existing record not only supports but demands the exclusion of debit card transfers from the payment transfer definition. Rather than harm the consumers that the Bureau is charged with protecting and the financial services industries on which those consumers depend, and then conducting yet more rulemaking that could extend past 2020, the Bureau should exclude electronic funds transfers initiated by a debit card or prepaid card from the definition of payment transfer at Section 1041.8(a)(1). Doing so would continue to protect consumers from excessive NSF fees from the typical culprits (checks and ACH transfers) while allowing consumers the option to make more payments by debit cards and significantly reduce such fees.

As explained above in Section III, the Bureau's decision to include debit card and prepaid card transfers in the definition of payment transfer was based on portions of the record that considered the effect on consumers of ACH transfers, a different payment method that results in fees that generally do not exist for debit card and prepaid card transfers. Furthermore, that decision flies in the face of uncontroverted empirical evidence in the record contradicting the Bureau's claim that the inclusion of debit card and prepaid card transfers was necessary for financial service providers to be able to administer the Rule. In this way, the Bureau's action was akin to the SEC that the United States Court of Appeals for the District of Columbia Circuit set aside in *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

There, as here, the agency acted based "upon insufficient empirical data" that was contradicted by "numerous studies submitted by commenters that reached the opposite result." *Id.* at 1150–51. In this regard, the Final Rule's claims that excluding payments through debit cards and prepaid cards would not "alleviate much compliance burden" and could even increase compliance costs were completely unsupported and are contrary to information provided by industry and plain common sense—alternative means of collection, such as litigation, impose greater costs. Likewise, the Final Rule's bare assertions of unidentified "administrative challenges" and enforcement challenges find no record support and ignore the pervasive regulation, at the state and federal levels, of debit card networks and transactions.

Similarly, the Bureau "duck[ed] a serious evaluation of the costs" of the rule by relying on costs of ACH transfers on consumers in including debit card and prepaid card transfers in the definition. But unlike checks and ACH debits, debit card transactions generally pose no risk of overdraft or NSF fees—if the account lacks adequate funds to cover the debit, the transaction is simply denied. Only when a consumer has expressly chosen to obtain overdraft coverage is a fee even possible, and fully two-thirds of consumers have not done so. In short, the Bureau ducked a serious evaluation of the costs and burdens of the rule on consumers and financial services provider by arbitrarily relying on other forms of payment that do not extend to debit card payments.

The likely result of the Bureau's potential failure to correct its failure to exclude debit card and prepaid card transfers would be vacatur of the definition of payment transfer at Section 1041.8(a)(1). Not only is vacatur the presumptive remedy for arbitrary and capricious agency action, *see Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) (collecting cases), but that presumption is reinforced where, as in this case, the agency will be unable to justify maintaining the inclusion of debit card and prepaid cards in the payment transfer definition on remand, *see Fox Television Stations, Inc. v. Fed. Comms. Comm'n*, 280 F.3d 1027, 1052–53 (D.C. Cir. 2002).

Vacatur of the payment transfer definition would lead to substantial uncertainty in administering the Final Rule, even as amended through reconsideration. The term "payment transfer" is one of the backbone definitions of the Final Rule and is used frequently throughout, including in Sections 1041.3, 1041.8, 1041.9, and 1041.12. Each of these mechanisms would be placed in jeopardy with vacatur and could require substantial effort on the part of the Bureau to address on remand. Depending on the timeframe for litigation and the potential necessity of additional notice and comment on remand, such proceedings may not be completed until after 2020. Even if the definition of payment transfer were partially vacated only to the extent it failed to exclude debit cards and prepaid cards, the possibility of remand proceedings after 2020 exist.

In addition to these legal problems for the Bureau, the interim period between finalization of a reconsideration proceeding that failed to exclude debit cards and prepaid cards would exacerbate the already substantial uncertainty in the marketplace that would exist if the Bureau declines to modify this definition. The mere fact of delay in fixing the failure to exclude prepaid cards and debit cards from the definition of payment transfers could cause those same financial services providers potentially moving towards less consumer- friendly financial products and payment methods, and it is far from certain that they would return to their traditional offerings with a later fix. This uncertainty would harm both consumers and financial service providers for the reasons discussed above.

Finally, this Rule is the Bureau's inaugural exercise of authority under Section 1031, and because it will set precedent for the future, "it is critical that, in any final rule, the Bureau identify unfair or abusive acts only for which it has evidence establishing the unfairness or abusiveness of the act. The Bureau has not met that standard in the proposed rule with respect to small dollar installment loans, single payment loans, and lines of credit offered by banks." American Bankers Association Comment on the Proposed Rule at 6 (Oct. 7, 2016). Given that no additional research or analysis is required to conclude that the Final Rule's approach lacks support and imposes unjustified burdens on both lenders and consumers, as this conclusion can be made on the existing record, any failure to revisit inclusion of debit cards and prepaid cards from the payment transfer definition would be a problem of the Bureau's own making.

V. Rulemaking Request

The Bureau should modify the definition of payment transfer to clarify that a transfer initiated through a debit card or a prepaid card is not included. To make the change, the Bureau should simply insert the following paragraph in Section 1041.8(a)(1):

> (iii) Exclusion for certain transfers. An electronic funds transfer initiated by a debit card or a prepaid card is not a payment transfer, notwithstanding that the transfer otherwise meets the description in paragraph (a)(1) of this section.

Respectfully submitted,

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