

Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552



July 7, 2020

Andrew M. Grossman
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RE: Petition for Rulemaking from Advance Financial

Dear Mr. Grossman,

Thank you for the petition for rulemaking that you filed on behalf of Advance Financial regarding the Consumer Financial Protection Bureau's regulation governing Payday, Vehicle Title, and Certain High-Cost Installment Loans ("the rule"). In the petition, you requested "that the Bureau amend the [rule] to exclude debit card payments and that [the Bureau] do so in conjunction with its reconsideration of the [rule's] ability-to-pay provisions."¹ The Bureau is denying your petition, for the reasons set forth below.

Background

The Rule

On October 5, 2017, the Bureau issued the rule regarding certain consumer credit products.² The rule was codified at 12 C.F.R. Part 1041 (12 C.F.R. §§ 1041.1-15). The rule had two primary parts. First, certain provisions of the rule (the "Mandatory Underwriting Provisions") identified a lender's making of short-term and longer-term loans with balloon payments without

¹ Advance Financial, Petition for Rulemaking and Supplementary Comment, at 2 (Dec. 13, 2018) ("Petition").

² See generally Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472, 54746 (Nov. 17, 2017) ("2017 Final Rule").

reasonably determining that consumers have the ability to repay the loans according to their terms to be an unfair and abusive practice. *See* 12 C.F.R. 1041 Subpart B. Second, for the same set of loans and for longer-term loans with an annual percentage rate greater than 36 percent that are repaid directly from the consumer's account, the Payment Provisions of the rule identified attempting to withdraw payment from a consumer's account after two consecutive payment attempts have failed, without obtaining the consumer's new and specific authorization to make further withdrawals from the account, to be an unfair and abusive practice. *See* 12 C.F.R. §§ 1041.7-8. The Payment Provisions also required lenders to provide certain notices to the consumer before attempting to withdraw payment for such loans from the consumer's account. *See* 12 C.F.R. § 1041.9.

The Payment Provisions of the rule generally apply with respect to "payment transfers." *See generally* 12 C.F.R. Part 1041 Subpart C. "Payment transfer" is defined 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." 12 C.F.R. § 1041.8(a)(1). Further, "[a]ny electronic fund transfer meeting [this definition] is a payment transfer, including but not limited to an electronic fund transfer initiated by a debit card or a prepaid card." 12 C.F.R. § 1041.8(a)(1)(i)(A) cmt. 1.

2019 Proposal

On February 6, 2019, the Bureau proposed to rescind the Mandatory Underwriting Provisions of the rule.³ Regarding debit cards, the preamble to that proposal stated:

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 [proposal]. However, the Bureau has received a rulemaking petition [from Advance Financial] 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

³ *See generally* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. 4252, 4253 (Feb. 14, 2019) ("2019 Payday Reconsideration NPRM").

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).⁴

On July 7, 2020, the Bureau rescinded the Mandatory Underwriting Provisions of the rule.⁵

Advance Financial Petition

As noted above, the petition “requests that the Bureau amend the [rule] to exclude debit card payments and that it do so in conjunction with its reconsideration of the [rule’s] ability-to-pay provisions.”⁶

The petition argues that “[u]nlike other payment types subject to the [rule], such as [automated clearing house] and check transfers, debit card transactions do not pose any risk of likely substantial injury to consumers, as the Bureau itself acknowledged.”⁷ Specifically, the petition argues that “[a]lthough check and [automated clearing house] 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 institution.”⁸ The petition argues that “[b]ecause 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.”⁹

⁴ 2019 Payday Reconsideration NPRM, 84 Fed. Reg. at 4253. Although the petition indicates that it is a “supplementary comment” as well as a petition for rulemaking, the Bureau did not have an open comment period regarding the payday rule when the petition was filed.

⁵ <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/payday-vehicle-title-and-certain-high-cost-installment-loans-revocation-rule/>.

⁶ Petition at 2; *see also* Cover Letter to the Petition (“The petition and comments request that the Bureau, as part of its currently pending reconsideration of [the 2017 Final] Rule, exempt debit card payments from the Rule’s payment provisions.”).

⁷ Petition at 10.

⁸ Petition at 12.

⁹ Petition at 13.

Further, the petition argues that “[e]ven assuming *arguendo* that debit cards could pose a substantial risk of harm, their benefits to consumers outweigh the potential harm.”¹⁰ Specifically, the petition argues that “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 [insufficient funds] fees the Bureau cites as unfair and abusive and (2) more flexible longer-term loans that employ debit card payment options.”¹¹

Although the petition’s argument focuses primarily on debit cards, the petition’s “rulemaking request” would also exempt prepaid cards from the Payment Provisions. Specifically, the petition requests that the Bureau “modify the definition of payment transfer to clarify that a transfer initiated through a debit card or a prepaid card is not included.”¹²

Discussion

When the Bureau proposed and finalized the rule, we specifically considered and responded to arguments from commenters that are similar to the arguments made in the petition. In particular, as described above, the petition argues that “[u]nlike 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.”¹³ In the preamble to the rule, the Bureau similarly indicated that “[s]everal commenters, including State Attorneys General, argued that payments made using debit cards should be exempt because they generally do not engender [insufficient funds] fees, and thus, the harm justifying the identified unfair and abusive act or practice is diminished for debit card payments.”¹⁴ The Bureau responded:

The Bureau has decided not to exempt payments made using debit cards from the rule. First, while failed debit card transactions may not trigger [insufficient funds] 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

¹⁰ Petition at 10.

¹¹ Petition at 21.

¹² Petition at 33.

¹³ Petition at 10.

¹⁴ 2017 Final Rule, 82 Fed. Reg. at 54746.

each presentment. And third, the Bureau does not believe an exclusion based on payment type would work to alleviate much compliance burden associated with [the Payments Provisions] 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.¹⁵

Similarly, in the preamble to the rule, the Bureau noted that “[d]uring the [Small Business Regulatory Enforcement Fairness Act] 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” and that “[o]ne 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 [insufficient funds] fee in connection with a second failed payment attempt involving a debit card transaction that is declined.¹⁶ The Bureau responded to these comments as well.¹⁷ That said, while the Bureau rejected arguments that debit card transactions should be excluded from the rule because debit card payments generally do not result in insufficient funds fees, the Bureau did create a conditional exclusion

¹⁵ 2017 Final Rule, 82 Fed. Reg. at 54748.

¹⁶ 2017 Final Rule, 82 Fed. Reg. at 54750.

¹⁷ See 2017 Final Rule, 82 Fed. Reg. at 54748 (“As explained in the proposal, the Bureau understood that depository institutions generally do not charge consumers [insufficient funds] 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 [another section of the preamble,] Market Concerns—Payments, the Bureau’s research focusing on online lenders’ attempts to collect covered loan payments through the [automated clearing house] 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.”).

from the Payment Provisions for a lender that is also the account-holding institution where the lender, among other things, does not charge insufficient funds fees.¹⁸

Accordingly, we believe that the Bureau has already largely responded to the arguments now made in the petition. We note that the petition does not provide new facts or data or describe circumstances that have changed since the issuance of the rule. Given this, with respect to arguments now made in the petition that the Bureau previously responded to when issuing the rule, we decline to reconsider the Bureau's previous response. To the degree that the petition makes somewhat distinct arguments that were not considered when the Bureau issued the rule – such as that the benefits to consumers from debit card payments in this context outweighs the potential harm – we do not believe that the petition's arguments are sufficiently compelling or different from the arguments that the Bureau previously considered for us to reconsider the previous response, given that the petition does not provide new facts or data or describe circumstances that have changed since the issuance of the rule.

Additionally, we note that the Bureau already has an otherwise active and busy agenda, including significant rulemaking activity, and in particular activity with urgent timing considerations or that is required by law. The Bureau's Fall 2019 and Spring 2020 Agendas¹⁹ – which are part of the Unified Agenda of Federal Regulatory and Deregulatory Actions,²⁰ as coordinated by the Office of Management and Budget – together describe the regulatory matters that the Bureau reasonably anticipates having under consideration during the period from October 1, 2019 to April 30, 2021. As these agendas suggest, the Bureau already plans to engage

¹⁸ See 12 C.F.R. § 1041.8(a)(1)(ii); 2017 Final Rule, 82 Fed. Reg. at 54746 (“In response to the sound suggestion received from several commenters, the Bureau is adding . . . a conditional exclusion for certain lenders that are also the borrower's account-holding institution. That exclusion only applies to instances where the lender has set forth in the original loan agreement or account agreement that it will not charge the consumer a fee for payment attempts when the account lacks sufficient funds to cover the payment, and that it will not close the account in response to a negative balance that results from a transfer of funds initiated in connection with the covered loan. If lenders do not charge NSF, overdraft, return payment fees, or similar fees, and do not close accounts because of failed payment attempts, the harms underpinning the unfair and abusive practice identified in § 1041.7 would not occur, and thus the Bureau concludes that the rule does not need to cover those instances.”).

¹⁹ See Bureau of Consumer Financial Protection, Preamble to semiannual regulatory agenda (July 26, 2019) (“Preamble to Fall 2019 Unified Agenda”), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201910/Preamble_3170_CFPB.pdf; Bureau of Consumer Financial Protection, Preamble to semiannual regulatory agenda (Mar. 5, 2020) (“Preamble to Spring 2020 Unified Agenda”), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202004/Preamble_3170_CFPB.pdf.

²⁰ <https://www.reginfo.gov/public/do/eAgendaMain>.

in significant rulemaking activity at this time. This includes activity with urgent timing considerations²¹ or that is required by law.²² The Bureau is also actively engaged in responding to the COVID-19 crisis, including providing guidance to regulated entities and providing resources to the public. Given that the Bureau has already largely considered and responded to arguments that are similar to those made in the petition and that the petition does not provide new facts or data or describe circumstances that have changed since the issuance of the rule, we choose at this time to prioritize the other items on the Bureau’s agenda over the petition’s request. As with all of its rulemaking, the Bureau will monitor and assess the effects of the Payment Provisions, including with regard to debit cards, and the Bureau may determine whether further action is needed in light of what it learns.

²¹ See, e.g., Preamble to Fall 2019 Unified Agenda, at 7 (“The Bureau is now focusing its attention on a regulatory provision that extends qualified mortgage status to loans that are eligible to be purchased or guaranteed by either Fannie Mae or Freddie Mac (which are often called the Government Sponsored Enterprises or GSEs) while they operate under Federal conservatorship or receivership. The ‘GSE patch’ provision is set to expire in January 2021, meaning that loans originated after that date would not be eligible for qualified mortgage status under its criteria.”); *id.* (“[T]he Bureau issued in April 2019 a Request for Information to gather information related to the scope of the Remittance Rule’s coverage and the expiration of a statutorily-established exception in the Remittance Rule that permits insured banks and insured credit unions to estimate certain required disclosures and other potential remittance transfer issues. In its consideration of appropriate next steps, including potentially rulemaking, the Bureau is considering stakeholder feedback during the assessment process and comments received in response to the Request for Information.”).

²² See, e.g., Preamble to Fall 2019 Unified Agenda, at 3 (“The Bureau is engaged in a number of rulemakings to implement directives mandated in the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 (EGRRCPA), Public Law 115-174, 132 Stat. 1297, the Dodd-Frank Act, and other statutes. . . . For example, in March 2019, the Bureau published an Advance Notice of Proposed Rulemaking (ANPRM) to seek public comment relating to implementation of section 307 of the EGRRCPA, which amends the Truth in Lending Act (TILA) to mandate that the Bureau prescribe certain regulations relating to ‘Property Assessed Clean Energy’ (PACE) financing.”); *id.* at 4 (“Section 1071 of the Dodd-Frank Act amended the Equal Credit Opportunity Act to require, subject to rules prescribed by the Bureau, financial institutions to collect, report, and make public certain information concerning credit applications made by women-owned, minority-owned, and small businesses. The Bureau is hosting a symposium on small business data collection in November 2019 in order to facilitate a robust discussion with outside experts on the issues implicated by creating such a data collection and reporting regime. After the symposium, the Bureau anticipates that its next step will be the release of materials in advance of convening a panel under the Small Business Regulatory Enforcement Fairness Act, in conjunction with the Office of Management and Budget and the Small Business Administration’s Chief Counsel for Advocacy, to consult with representatives of small businesses that may be affected by the rulemaking.”).

Conclusion

Thank you again for submitting the petition for rulemaking on behalf of Advance Financial. Although the Bureau denies the petition, we appreciate the arguments raised and hope to hear from you in the future about the effects of the Payments Provisions of the rule.

Sincerely,

A handwritten signature in blue ink that reads "Kathleen L. Kraninger". The signature is fluid and cursive, with the first name being the most prominent.

Kathleen L. Kraninger

Director