

**BUREAU OF CONSUMER FINANCIAL PROTECTION**

**12 CFR Part 1041**

**[Docket No. CFPB-2019-0007]**

**RIN 3170-AA95**

**Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date; Correcting Amendments**

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Final rule; delay of compliance date; correcting amendments.

**SUMMARY:** The Bureau of Consumer Financial Protection (Bureau) is issuing this final rule to delay the August 19, 2019 compliance date for the mandatory underwriting 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). Compliance with these provisions of the Rule is delayed by 15 months, to November 19, 2020. The Bureau is also making certain conforming changes and corrections to address several clerical and non-substantive errors it has identified in the Rule.

**DATES:** *Effective date:* The amendments in this final rule are effective on **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. *Compliance dates:* The compliance date for §§ 1041.4 through 1041.6, 1041.10, and 1041.12(b)(1) through (3) in the final rule published on November 17, 2017 (82 FR 54472), as amended by this final rule, is delayed from August 19, 2019 to November 19, 2020. The compliance date for §§ 1041.2, 1041.3, 1041.7 through 1041.9, 1041.12(a), (b) introductory text, (b)(4) and (b)(5), and 1041.13 remains August 19, 2019.

**FOR FURTHER INFORMATION CONTACT:** 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](mailto:CFPB_Accessibility@cfpb.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Summary of the Final Rule**

On October 5, 2017, the Bureau issued the 2017 Final Rule establishing 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 (Dodd-Frank Act).<sup>1</sup> The Rule was published in the **Federal Register** on November 17, 2017.<sup>2</sup> 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 loans and longer-term balloon-payment loans, including payday and vehicle title loans, and related reporting and recordkeeping requirements.<sup>3</sup> 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, establishing certain requirements and limitations with respect to attempts to withdraw payments from consumers’ checking or other accounts, and related recordkeeping requirements.<sup>4</sup> These are referred to herein as the “Payment Provisions” of the 2017 Final Rule.

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<sup>1</sup> Public Law 111-203, 124 Stat. 1376 (2010).

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

<sup>3</sup> 12 CFR 1041.4 through 1041.6, 1041.10, 1041.11, and portions of 1041.12.

<sup>4</sup> 12 CFR 1041.7 through 1041.9, and portions of 1041.12.

The 2017 Final Rule became effective on January 16, 2018, although most provisions (12 CFR 1041.2 through 1041.10, 1041.12, and 1041.13) had a compliance date of August 19, 2019.<sup>5</sup>

On February 6, 2019, the Bureau issued proposals seeking comment on whether the Bureau should rescind the Mandatory Underwriting Provisions of the 2017 Final Rule (Reconsideration NPRM)<sup>6</sup> and on whether it should delay the compliance date for those provisions (Delay NPRM).<sup>7</sup> In the Delay NPRM, the Bureau proposed to delay the August 19, 2019 compliance date for the 2017 Final Rule’s Mandatory Underwriting Provisions—specifically, §§ 1041.4 through 1041.6, 1041.10, 1041.11, and 1041.12(b)(1)(i) through (iii), (b)(2), and (b)(3)—to November 19, 2020.<sup>8</sup> These proposals did not include reconsideration or delay of the Payment Provisions.

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<sup>5</sup> 82 FR 54472, 54814. On January 16, 2018, the Bureau issued a statement announcing its intention to engage in rulemaking to reconsider the 2017 Final Rule. Bureau of Consumer Fin. Prot., *Statement on Payday Rule* (Jan. 16, 2018), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/>. On October 26, 2018, the Bureau issued a subsequent statement announcing it 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. 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/>. 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. *Cnty. 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.

<sup>6</sup> 84 FR 4252 (Feb. 14, 2019).

<sup>7</sup> 84 FR 4298 (Feb. 14, 2019).

<sup>8</sup> The list of provisions for which the Bureau proposed to delay the August 19, 2019 compliance date in the Delay NPRM corresponded to the list of provisions that the Bureau proposed to rescind in the Reconsideration NPRM. As discussed below, although § 1041.11 is part of the Mandatory Underwriting Provisions of the Rule, its operative date was January 16, 2018, which the Bureau is not changing. In the Reconsideration NPRM, the Bureau proposed to modify the introductory text of § 1041.12(b)(1) for clarity as to its application to loan agreements for all covered loans, and thus it was not listed with the provisions that the Bureau proposed to rescind. Since the Bureau is not modifying the introductory text of § 1041.12(b)(1) in this final rule, it is included in the list of provisions for which the compliance date is delayed.

For the reasons discussed below and based on comments received, the Bureau is issuing this final rule to delay the August 19, 2019 compliance date for the Mandatory Underwriting Provisions, to November 19, 2020, in order to permit an orderly conclusion to its separate rulemaking process to reconsider the Mandatory Underwriting Provisions. In short, after reviewing the comments received on the Delay NPRM, the Bureau concludes that (1) it has strong reasons to revisit the Mandatory Underwriting Provisions on the grounds set out in the Reconsideration NPRM; and (2) if the Mandatory Underwriting Provisions went into effect while the Bureau was in the process of reconsidering these provisions, as described below, consequences would likely follow—some of which may be irreversible even if the Mandatory Underwriting Provisions were later rescinded—that the Bureau believes may prove unwarranted and may undermine effective reconsideration of the 2017 Final Rule. In light of these considerations, the Bureau concludes that it is appropriate to delay compliance with the Mandatory Underwriting Provisions for 15 months to allow time for the Reconsideration NPRM rulemaking process to be completed.

The Bureau is also making conforming amendments to certain regulatory text and commentary adopted in the 2017 Final Rule to reflect the compliance date delay as well as including an additional section to the Rule setting forth the compliance dates in detail.

The Bureau is also making certain corrections to address several clerical and non-substantive errors it has identified in the 2017 Final Rule. No substantive change is intended by these corrections.

## II. Background

### A. The 2017 Final Rule

In the 2017 Final Rule, the Bureau established regulations for payday loans, vehicle title loans, and certain high-cost installment loans. The Rule was published in the **Federal Register** on November 17, 2017. It became effective on January 16, 2018, although most provisions (§§ 1041.2 through 1041.10, 1041.12, and 1041.13) have a compliance date of August 19, 2019.

As mentioned above, the 2017 Final Rule addressed two discrete topics: the Mandatory Underwriting Provisions and the Payment Provisions.<sup>9</sup> The Mandatory Underwriting Provisions identified as an unfair and abusive practice the making of certain short-term and longer-term balloon-payment loans without reasonably determining that consumers will have the ability to repay the loans according to their terms. The Mandatory Underwriting Provisions include two methods that permit providers to offer covered short-term and longer-term balloon-payment loans. Under one method, lenders making covered short-term and longer-term balloon-payment loans are required to, among other things, 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 re-borrow over the ensuing 30 days; the Rule sets forth a number of specific requirements that a lender must satisfy in this

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<sup>9</sup> The Payment Provisions apply to a broader group of covered loans, which include covered short-term and longer-term balloon-payment loans as well as certain high-cost installment loans, establishing certain requirements and limitations with respect to attempts to withdraw payments from consumers' checking or other accounts. The Rule identifies as an unfair and abusive practice lenders' attempts to withdraw payment on these loans from consumers' accounts after two consecutive payment attempts have failed, unless the consumer provides a new and specific authorization to do so. The Rule also prescribes notices lenders must provide to consumers before attempting to withdraw payments from their accounts.

In addition, the Rule includes other generally applicable provisions such as definitions, exemptions, and requirements for compliance programs and record retention (with portions specific to the Mandatory Underwriting Provisions and to the Payment Provisions).

regard.<sup>10</sup> Under the other method, lenders are allowed to make certain covered short-term loans without meeting all the specific underwriting criteria 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.<sup>11</sup>

In general, under either method, a lender is to obtain and consider a consumer report from an information system registered or provisionally registered with the Bureau (referred to herein as a “registered information system” or an RIS) before making a covered short-term or longer-term balloon-payment loan.<sup>12</sup> In addition, other portions of the Rule require lenders to furnish to RISes<sup>13</sup> certain information concerning covered short-term and longer-term balloon-payment loans at loan consummation, during the period that the loan is an outstanding loan, and when the loan ceases to be an outstanding loan.<sup>14</sup>

### *B. Subsequent Actions*

As noted above, on January 16, 2018, the Bureau issued a statement announcing its intention to engage in rulemaking to reconsider the 2017 Final Rule. In addition, the statement notified entities seeking to become RISes that the Bureau would entertain requests to waive

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<sup>10</sup> 12 CFR 1041.5.

<sup>11</sup> 12 CFR 1041.6.

<sup>12</sup> 12 CFR 1041.5(c)(2)(ii)(B) and (d)(1), and 1041.6(a). Only the latter approach, however, requires the consumer report from an information system that has been registered with the Bureau for 180 days or more pursuant to § 1041.11(c)(2) or is registered with the Bureau pursuant to § 1041.11(d)(2). *See* § 1041.6(a). Under § 1041.5, a national consumer report (as defined in § 1041.5(a)(4)) is required, subject to limited exceptions, as is a consumer report from an RIS if available.

<sup>13</sup> The 2017 Final Rule bifurcated the process for registering information systems: the first phase for entities seeking preliminary registration prior to the August 19, 2019 compliance date; and the second phase for entities seeking provisional registration on or after the August 19, 2019 compliance date. An entity seeking preliminary registration under the first phase was required to submit to the Bureau an initial application for preliminary approval for registration by April 16, 2018. After receiving preliminary approval from the Bureau, the entity must submit its application for registration within 120 days from the date preliminary approval was granted. *See* 12 CFR 1041.11(c).

<sup>14</sup> *See* 12 CFR 1041.10(c).

entities' preliminary approval application deadline.<sup>15</sup> Since that time, the Bureau has issued several waivers and published copies of those waivers on its website.<sup>16</sup> On October 26, 2018, the Bureau issued a subsequent statement announcing that it expected to issue NPRMs to reconsider certain provisions of the 2017 Final Rule and to address the Rule's compliance date.<sup>17</sup>

On April 9, 2018, a legal challenge to the 2017 Final Rule was filed in the United States District Court for the Western District of Texas.<sup>18</sup> On June 12, 2018, the court issued an order staying the litigation.<sup>19</sup> On November 6, 2018, the court stayed the August 19, 2019 compliance date of the 2017 Final Rule until further order of the court.<sup>20</sup>

### *C. Compliance Date Delay Proposal*

As noted above, on February 6, 2019, the Bureau issued the Reconsideration NPRM seeking comment on the Bureau's proposal to rescind the Mandatory Underwriting Provisions of the 2017 Final Rule and the Delay NPRM seeking comment on the Bureau's proposal to delay the compliance date for those provisions. The Bureau stated in its Delay NPRM that it preliminarily believed it had set forth strong reasons for proposing to rescind the Mandatory Underwriting Provisions of the Rule, as detailed in the Reconsideration NPRM. The Bureau was concerned that mandating compliance by August 19, 2019 with portions of the Rule that the

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<sup>15</sup> Bureau of Consumer Fin. Prot., *Statement on Payday Rule* (Jan. 16, 2018), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/>.

<sup>16</sup> See Bureau of Consumer Fin. Prot., *Payday, Vehicle Title, and Certain High-Cost Installment Loans Registered Information Systems registration program—Waiver requests and Bureau determinations*, <https://www.consumerfinance.gov/policy-compliance/guidance/payday-loans-registered-information-systems-registration-program/registered-information-systems/#waivers>. As of June 5, 2019, there are no information systems registered with the Bureau.

<sup>17</sup> 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/>.

<sup>18</sup> *Cnty. Fin. Serv. Ass'n of Am. v. Consumer Fin. Prot. Bureau*, No. 1:18-cv-295 (W.D. Tex.).

<sup>19</sup> See *id.*, ECF No. 29.

<sup>20</sup> See *id.*, ECF No. 53.

Bureau had good reasons to believe should be rescinded would impose significant and potentially unwarranted costs on industry participants, create substantial revenue disruptions that could impact the ability of some market participants to stay in business, and restrict access to consumer credit. The Bureau preliminarily believed, based on its experience developing the 2017 Final Rule and other similar rulemakings, that a compliance date of November 19, 2020 would allow the Bureau adequate opportunity to review comments on its Reconsideration NPRM regarding the Mandatory Underwriting Provisions and to make any changes to those provisions before affected entities incurred significant costs that would impair their ability to remain in business and before consumers experienced a restriction in their ability to choose the credit they prefer.

#### *D. Compliance Date Delay Final Rule*

For the reasons set forth herein and based on comments received, the Bureau is issuing this final rule to delay the August 19, 2019 compliance date for the Mandatory Underwriting Provisions of the 2017 Final Rule—specifically, §§ 1041.4 through 1041.6, 1041.10, and 1041.12(b)(1) through (3)<sup>21</sup>—to November 19, 2020, to permit an orderly conclusion to its separate rulemaking process to reconsider the Mandatory Underwriting Provisions of the 2017 Final Rule.<sup>22</sup> The Bureau is making conforming amendments to certain regulatory text and commentary adopted in the 2017 Final Rule to reflect the compliance date delay as well as supplementing the Rule with an additional section (§ 1041.15) setting forth in detail its effective and compliance dates.

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<sup>21</sup> As discussed below, although § 1041.11 is part of the Mandatory Underwriting Provisions of the Rule, its operative date was January 16, 2018, which the Bureau is not changing.

<sup>22</sup> In addition, as described in the Delay NPRM, outreach to affected entities since the finalization of the 2017 Final Rule had brought to light certain potential obstacles to compliance that were not anticipated when the original compliance date was set; these concerns were echoed by some commenters on the Delay NPRM. However, as discussed in more detail below, the Bureau is not finalizing this compliance date delay on those grounds.



The Bureau is also making certain corrections to address several clerical and non-substantive errors it has identified in the 2017 Final Rule in §§ 1041.2(a)(9), 1041.3(e)(2), 1041.9(c)(3)(viii), and appendix A. No substantive change is intended by these corrections.

### **III. Summary of the Rulemaking Process, Comments Received, and the Final Rule**

As noted above, the Bureau proposed to delay the compliance date for the 2017 Final Rule's Mandatory Underwriting Provisions for several reasons. As explained in more detail below, the Bureau now concludes that it is appropriate to delay the August 19, 2019 compliance date for the Mandatory Underwriting Provisions of the 2017 Final Rule—specifically, §§ 1041.4 through 1041.6, 1041.10, and 1041.12(b)(1) through (3)—to November 19, 2020.

In short, after reviewing all comments received on the Delay NPRM, the Bureau has determined that finalizing the proposed delay is appropriate because there are strong reasons for rescinding the Mandatory Underwriting Provisions of the 2017 Final Rule and because significant and potentially unwarranted consequences to covered entities, consumers, and the market would occur if compliance with those aspects of the Rule was required by August 19, 2019. In addition, the Bureau has concluded that 15 months is an adequate amount of time to allow the Bureau to complete its reconsideration rulemaking. First, there are strong reasons to reconsider the evidentiary and legal bases for the unfairness and abusiveness findings underlying the Mandatory Underwriting Provisions of the 2017 Final Rule. The Bureau has initiated the process for reconsidering those provisions by issuing the Reconsideration NPRM, which sets forth in detail the Bureau's reasons for proposing to rescind the Mandatory Underwriting Provisions. After considering all the comments received on the Delay NPRM and with an open mind on all issues to be decided in the Reconsideration NPRM, the Bureau concludes that for

purposes of this final rule there are strong reasons to rescind the Mandatory Underwriting Provisions.

Second, the Bureau concludes that if compliance were to become mandatory while the reconsideration rulemaking is ongoing, several significant and potentially unwarranted consequences would likely result, including significant compliance costs, the potential exit of some smaller providers, and restricted access to consumer credit. Those consequences would risk undermining effective reconsideration of the Rule by imposing potentially market-altering effects, some of which may be irreversible if the Bureau required compliance with the Mandatory Underwriting Provisions and then later rescinded them. The Bureau is particularly concerned that some smaller providers may permanently exit the market if they are required to comply with the Mandatory Underwriting Provisions while reconsideration is ongoing.

In light of these considerations, the Bureau concludes that it is appropriate to delay the compliance date for 15 months to allow time for the Reconsideration NPRM rulemaking process that the Bureau has initiated—and through which the Bureau has received approximately 190,000 comments—to be completed.

#### *A. Comments Received, Generally*

The comment period on the Delay NPRM closed on March 18, 2019. The Bureau received approximately 150 comment letters from individuals, consumer advocacy groups, a group of State attorneys general, depository and non-depository lenders, tribal governments, national and regional trade associations, service providers, the Small Business Administration's

Office of Advocacy (SBA OA), legislative and executive branch State government officials, and others.<sup>23</sup>

Commenters writing in support of the proposed delay included lenders, trade associations, tribal governments, the SBA OA, individual commenters, and others. Some of these commenters also expressed their support for rescission of the Mandatory Underwriting Provisions as proposed in the Reconsideration NPRM. Commenters writing in opposition to the proposed delay included a number of consumer advocacy groups, a group of State attorneys general, legislative and executive branch State government officials, individual commenters, and others. Some of these commenters also expressed their opposition to the rescission of the Mandatory Underwriting Provisions as proposed in the Reconsideration NPRM.

These comments are discussed in more detail below. At a high level, comments in support of the proposed delay generally spoke to harms to industry and to consumers that the commenters asserted would occur if the August 19, 2019 compliance date for the Mandatory Underwriting Provisions stayed in place and that would be postponed if those provisions were delayed. These comments also argued that a delay was appropriate to give the Bureau time to complete its process of reconsidering the Mandatory Underwriting Provisions. Comments focusing on the merits of the Mandatory Underwriting Provisions themselves more generally also claimed that there were flaws in the Rule, the data underlying the Rule, or the rulemaking process. Some comments also discussed individual consumers' positive experiences with payday or vehicle title loans.

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<sup>23</sup> These comment letters, as well as summaries of any ex parte presentations regarding this rulemaking, are available on the public docket for the rulemaking at <https://www.regulations.gov/docket?D=CFPB-2019-0007>.

Commenters opposing the proposed delay generally spoke to the consumer harms that they asserted occur with loans covered by those provisions. These commenters also focused on the bad practices in which they alleged lenders engage. Commenters in addition raised issues such as requirements under the Administrative Procedure Act for compliance date delays and the Bureau's authority to delay the compliance date of the Rule. Commenters focusing on the merits of the Mandatory Underwriting Provisions also more generally referenced, for example, the Bureau's prior research and evidence in this area, and discussed the interaction of Federal protections with those offered by the States.

Commenters, both supporting and opposing the delay, addressed the Bureau's proposed rationales for delaying the compliance date of the Mandatory Underwriting Provisions. Specifically, the comments offered views on the Bureau's preliminary conclusion that there are strong reasons for rescinding the Mandatory Underwriting Provisions. They also offered views on the unanticipated obstacles to compliance that came to light after publication of the 2017 Final Rule, as discussed in the Delay NPRM. Commenters also responded to the Bureau's specific solicitations for comment, which included seeking comment on: (1) what challenges industry would face in complying with the Mandatory Underwriting Provisions by August 19, 2019; (2) whether delaying the Mandatory Underwriting Provisions would have any crossover effects on implementation of the Payment Provisions; (3) whether delaying the compliance date for the Mandatory Underwriting Provisions would be better than not delaying the date for purposes of facilitating an orderly implementation period for the Rule; (4) the consequences of not delaying the Mandatory Underwriting Provisions; and (5) the impact of the proposed delay on consumers who use payday loans, vehicle title loans, and high-cost installment loans covered by the 2017 Final Rule.

Commenters also raised a number of issues that were outside the scope of the Delay NPRM. These comments are summarized in part III.D.6 below.

*B. Grounds for Finalizing the Compliance Date Delay*

*1. Strong Reasons Support Reconsideration of the Mandatory Underwriting Provisions*

A key predicate for the proposed compliance date delay was, as noted above, that the Bureau preliminarily believed that the Mandatory Underwriting Provisions of the 2017 Final Rule should be rescinded and had separately issued the Reconsideration NPRM seeking comment on whether it should rescind those provisions. As explained in the Delay NPRM, delaying the August 19, 2019 compliance date for the Mandatory Underwriting Provisions will give the Bureau the opportunity to review comments on the Reconsideration NPRM and to make any changes to those provisions before compliance with the Mandatory Underwriting Provisions causes a series of potentially market-altering effects, some of which may be irreversible for the smaller storefront lenders that permanently exit the market, that the Bureau has strong reasons to believe may prove unwarranted.

After reviewing the comments received, the Bureau concludes that there are strong reasons, on multiple grounds, to revisit the unfairness and abusiveness findings set out in the Mandatory Underwriting Provisions in the 2017 Final Rule. The Bureau initiated the process for reconsidering these specific unfairness and abusiveness findings by issuing the Reconsideration NPRM, which set forth in detail the Bureau's reasons for proposing to rescind the Mandatory Underwriting Provisions.

The Reconsideration NPRM proposed multiple independent grounds for rescinding the Mandatory Underwriting Provisions. First, the Reconsideration NPRM identified specific concerns with the adequacy of the evidence underpinning the reasonable avoidability element of

the unfairness finding, and the lack of understanding and inability to protect elements of the abusiveness finding of the Mandatory Underwriting Provisions.<sup>24</sup> The Reconsideration NPRM identified limitations to certain pieces of evidence, especially a key study by Professor Ronald Mann, that the 2017 Final Rule relied upon in determining that injury associated with short-term and longer-term balloon-payment loans issued without the lenders having reasonably determined a borrower's ability to repay was not reasonably avoidable and evinced a lack of consumer understanding.<sup>25</sup> The Reconsideration NPRM also identified a number of concerns with the weight the 2017 Final Rule placed on a key study by the Pew Charitable Trusts in finding an inability of consumers to protect themselves from covered short-term and longer-term balloon-payment loans issued without the lenders having reasonably determined a borrower's ability to repay.<sup>26</sup> The Bureau noted in the Reconsideration NPRM that 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 significantly diminish the market for covered short-term and longer-term balloon-payment loans and that would likely cause some smaller providers to exit the marketplace, resulting in a decrease in consumers' ability to choose the credit they prefer.<sup>27</sup>

Second, the Reconsideration NPRM identified concerns with the legal analysis in the Mandatory Underwriting Provisions of the 2017 Final Rule, specifically the application of statutory standards regarding two elements of unfairness, reasonable avoidability and countervailing benefits, and two elements of abusiveness, lack of understanding and

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<sup>24</sup> 84 FR 4252, 4264-68.

<sup>25</sup> *Id.* at 4265-66.

<sup>26</sup> *Id.* at 4267-68.

<sup>27</sup> *Id.* at 4264.

unreasonable advantage-taking.<sup>28</sup> The Reconsideration NPRM preliminarily found 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 a better interpretation of the unfairness standard in section 1031(c)(1) of the Dodd-Frank Act, informed by relevant longstanding precedent on reasonable avoidability under section 5 of the Federal Trade Commission Act. In particular, the Reconsideration NPRM preliminarily concluded that the 2017 Final Rule imposed what the Bureau now preliminarily believes was a problematic standard that required consumers to have a specific understanding of their individualized risk as determined by their ability to predict how long they will be in debt after taking out a covered short-term or longer-term balloon-payment loan. The Reconsideration NPRM also made similar preliminary conclusions as to the way the 2017 Final Rule interpreted lack of understanding under section 1031(d)(2)(A) of the Dodd-Frank Act.<sup>29</sup> The Reconsideration NPRM further preliminarily concluded that the 2017 Final Rule's application of the countervailing benefits element of the unfairness standard in section 1031(c)(1) of the Dodd-Frank Act did not consider the full countervailing benefits of the practice at issue; rather, the 2017 Final Rule discounted those benefits by taking into account the additional credit that would be available under the 2017 Final Rule's principle step-down exemption. The Bureau preliminarily found that, when fully accounted for, the countervailing benefits of the identified practice outweighed any relevant injury to consumers.<sup>30</sup> Finally, the Reconsideration NPRM preliminarily concluded that the 2017 Final Rule did not have a sufficient basis to conclude that by making covered short-term or

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<sup>28</sup> *Id.* at 4268-76.

<sup>29</sup> *Id.* at 4274-75.

<sup>30</sup> *Id.* at 4272-74.

longer-term balloon-payment loans without assessing consumers' ability to repay lenders take unreasonable advantage of consumers under the abusiveness provision of the Dodd-Frank Act.<sup>31</sup>

Commenters, as set out in detail below, took issue with some of the proposed grounds for rescinding the Mandatory Underwriting Provision of the 2017 Final Rule, or generally praised or criticized the approach the Bureau took in making unfairness and abusiveness findings in the 2017 Final Rule. Commenters opposed to the compliance date delay offered some generalized criticisms of the Bureau's proposed legal conclusions, asserting that they were problematic, without offering detailed explanations of statutory text or specific issues with the approach to interpreting unfairness and abusiveness in the Reconsideration NPRM. These commenters offered more details in their criticism of the Reconsideration NPRM's reassessment of the evidentiary support for the 2017 Final Rule's factual findings, although still not with great specificity.

Some commenters asserted generally that the Bureau did not offer a compelling basis for repealing the Mandatory Underwriting Provisions. Consumer advocacy groups and a group of State attorneys general asserted that the compliance date should remain unchanged because the 2017 Final Rule came to the correct legal and factual conclusions regarding the Mandatory Underwriting Provisions, which should be implemented without further delay. These State attorneys general and consumer advocacy groups also commented that the Bureau did not offer strong reasons in the Reconsideration NPRM or the Delay NPRM for proposing to rescind those provisions.

Consumer advocacy groups asserted that the Bureau failed to provide a reasoned explanation for its new position in the Reconsideration NPRM by neglecting large amounts of

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<sup>31</sup> *Id.* at 4275-76.



evidence concerning the serious impact on vulnerable consumers that underlay the 2017 Final Rule. Another consumer advocacy group claimed that the Bureau's rationale for reconsidering the Mandatory Underwriting Provisions contradicted years of original Bureau research, data, consumer complaints, secondary research, and other sources of evidence demonstrating consumer harm and impacts, and that the Bureau failed to provide a reasoned explanation for dismissing such evidence. A consumer advocacy group argued that the Reconsideration NPRM downplays much of this information to focus on critiquing two studies, and that in doing so the Bureau was attempting to rationalize a policy result that it had already chosen.

Trade associations, lenders, and service providers commented that the Mandatory Underwriting Provisions were based on flawed data and one-sided studies, which resulted in faulty conclusions. A service provider agreed with the concerns set out in the Bureau's Reconsideration NPRM as to the flaws in the rulemaking process for the 2017 Final Rule. A trade association and a tribal government agreed with the Bureau that the 2017 Final Rule was not supported by sufficiently robust and reliable evidence.

One consumer advocacy group commented that the Delay NPRM does not provide compelling factual reasons to cast serious doubt on the Mandatory Underwriting Provisions of the 2017 Final Rule, which, it claimed, were thoroughly vetted when finalized. Specifically, the consumer advocacy group asserted that the Bureau in the Reconsideration NPRM questioned the validity of just two studies, taken from a vast body of material underlying the 2017 Final Rule, offered a new interpretation of this existing evidence, and conceded that new, additional evidence could support the older findings from the 2017 Final Rule. The commenter argued that it was arbitrary and capricious for the Bureau to assert that the 2017 Final Rule must be

rescinded, as it did in the Reconsideration NPRM, when it could conduct further research and analysis to resolve evidentiary gaps.

A group of State attorneys general and consumer advocacy groups generally commented that the Bureau correctly analyzed and applied the unfairness and abusiveness standards in promulgating the Mandatory Underwriting Provisions of the 2017 Final Rule. These groups emphasized the extensive rulemaking record of the 2017 Final Rule, spanning many years, 1.4 million comments, and input from many stakeholders. These groups further asserted that the rulemaking record in the 2017 Final Rule detailed serious harm to consumers that would occur absent the Mandatory Underwriting Provisions. A consumer advocacy group asserted that the Mandatory Underwriting Provisions were precisely the type of measure that Congress designed the Bureau to create, and that in the Dodd-Frank Act, Congress identified protecting consumers from unfair, deceptive, and abusive acts and practices as a core objective of the Bureau. Further, the commenter noted that Congress singled out payday loans for special attention, providing the Bureau exclusive authority to conduct supervisory examinations of any provider that “offers or provides to a consumer a payday loan.”<sup>32</sup> Other consumer advocacy groups asserted in general terms that the Reconsideration NPRM mischaracterized the legal analysis of unfairness and abusiveness in the 2017 Final Rule, and that the legal analysis in the Reconsideration NPRM of unfairness and abusiveness was inconsistent with Federal Trade Commission precedent, Federal Reserve Board precedent, and Congressional intent.

Consumer advocacy groups and the group of State attorneys general emphasized the previous findings of consumer harm set out in the analyses of the 2017 Final Rule, quoting from

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<sup>32</sup> Section 1024(a)(1)(E) of the Dodd-Frank Act.

the 2017 Final Rule and other contemporaneous research. One consumer advocacy group provided case studies of individuals and families whom payday and title loans had affected.

Lenders, trade associations, and an attorney to lenders commented that in the 2017 Final Rule, the Bureau misapplied its unfairness and abusiveness authority. These commenters asserted that, rather than identifying and prohibiting specific practices that the Bureau found to be unfair and abusive, the Bureau in the 2017 Final Rule had instead prescribed a single set of mandatory practices under the theory that any other approach was unfair and abusive. Further, a number of trade associations noted that the requirements of the Mandatory Underwriting Provisions are overly burdensome, adding manual processes and verification of data that consumer loans do not ordinarily require. One trade association claimed that the Bureau exceeded its unfairness and abusiveness authority in the 2017 Final Rule because it offered no evidence to support the sweeping legal conclusion that all alternative underwriting approaches other than the one set out in § 1041.5 would be unfair or abusive. Lenders and trade associations commented that the Bureau, in developing the Mandatory Underwriting Provisions, failed to consider alternative and less burdensome State law approaches to regulating short-term and longer-term balloon-payment loans.

Overall, the Bureau does not agree with the comments that the Bureau did not offer strong reasons, or reasoned explanations, for proposing to rescind the Mandatory Underwriting Provisions. The Bureau identified multiple, independent, and specific evidentiary and legal grounds addressing specific elements of unfairness and abusiveness that would, if finalized, result in the rescission of the unfairness and abusiveness findings in § 1041.4 of the 2017 Final Rule and, as a result, would also require the rescission of the Mandatory Underwriting Provisions predicated on § 1041.4.

The Bureau further disagrees with the commenters who asserted that the Delay NPRM or the Reconsideration NPRM ignored a large body of evidence considered in conjunction with the 2017 Final Rule. The Reconsideration NPRM challenged the sufficiency and weight given to certain linchpin pieces of evidence, without which the Bureau preliminarily believes that the factual findings on which the Mandatory Underwriting Provisions are based cannot stand. The Delay NPRM, in turn, relied on the strong reasons for rescinding the 2017 Final Rule set out in the Reconsideration NPRM. The Bureau's preliminary conclusions in the Reconsideration NPRM and its assessment of the Reconsideration NPRM here for purposes of this delay final rule are based on both the existence of the complete body of evidence included in the 2017 Final Rule and its preliminary belief that certain linchpin evidence is not sufficiently robust and representative.

The Bureau recognizes that the comments of the consumer advocacy groups reflect strong disagreement with the substance of the Reconsideration NPRM, but the Bureau believes that, whatever the ultimate merit of those arguments is found to be, those arguments do not negate the fact that the Bureau has articulated strong reasons for revisiting the Mandatory Underwriting Provisions. Commenters did not offer specific reasons why the analyses of the limitations of a study by Professor Ronald Mann (Mann Study)<sup>33</sup> and a survey of payday borrowers conducted by the Pew Charitable Trusts (Pew Study),<sup>34</sup> as set out in the Reconsideration NPRM, were flawed, nor did they otherwise present concrete arguments that change the Bureau's assessment of the strength of the concerns expressed in the Reconsideration NPRM regarding that evidence. The Bureau does not agree with the comment that it was

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<sup>33</sup> Ronald Mann, *Assessing the Optimism of Payday Loan Borrowers*, 21 Supreme Court Econ. Rev. 105 (2013).

<sup>34</sup> Pew Charitable Trusts, *How Borrowers Choose and Repay Payday Loans* (2013), [https://www.pewtrusts.org/-/media/assets/2013/02/20/pew\\_choosing\\_borrowing\\_payday\\_feb2013-\(1\).pdf](https://www.pewtrusts.org/-/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-(1).pdf).

arbitrary and capricious of the Bureau not to conduct further research and analysis to resolve any evidentiary gaps. The Bureau noted in the Reconsideration NPRM that resolving the issues raised in that proposal pertaining to reasonable avoidability and to the inability of consumers to protect their interests would take significant resources and could not be accomplished in a timely and cost-effective manner. The Bureau does not foreclose the possibility of conducting additional research farther in the future.

The Bureau notes that the comments that defended the reasoning of the 2017 Final Rule did not call into question the precise grounds on which the Bureau based its Delay NPRM—that is, its preliminary determination that it had strong reasons for believing that the evidence underlying the identification of the unfair and abusive practice in the Mandatory Underwriting Provisions of the 2017 Final Rule was not sufficiently robust and reliable, and that its approach to unfairness and abusiveness should be revisited. Commenters did not identify new or other research not previously considered by the Bureau that undermine the preliminary determinations the Bureau made in the Reconsideration NPRM that, in turn, were the basis for the Bureau’s Delay NPRM. Nor did commenters challenge the Bureau’s preliminary policy decision, whatever the merits of the linchpin evidence, to require more robust and reliable evidence in the face of a regulation likely to cause widespread disruption in the payday market, including the exit of some lenders and a reduction in consumers’ ability to choose the credit they prefer. The Bureau also notes that, contrary to the views of some commenters, it did, in fact, consider alternative State law approaches in its 2017 Final Rule, and the Bureau does not agree that the Final Rule was devoid of evidence to support the Mandatory Underwriting Provisions; but, as explained above, the Bureau is reconsidering those provisions because it is concerned that the

evidence was not sufficiently robust and reliable in light of the significant effects that would be caused by the Mandatory Underwriting Provisions.

The commenters' criticisms of the legal grounds the Bureau set out in the Reconsideration NPRM for proposing to rescind the Mandatory Underwriting Provisions have not convinced the Bureau that it was mistaken in its preliminary view that the grounds for rescinding the Mandatory Underwriting Provisions are strong. The State attorneys general and consumer advocacy groups did not present detailed comments on the specific legal analyses of the elements of unfairness and abusiveness that the Reconsideration NPRM addressed—reasonable avoidability and countervailing benefits in analyzing unfairness, and lack of understanding and unreasonable advantage-taking in analyzing abusiveness—and the general criticisms offered have not changed the Bureau's preliminary assessment of the strength of its Reconsideration NPRM for purposes of delay.

To finalize the Delay NPRM the Bureau does not, and need not, finalize its determination as to its proposed reconsideration of the unfairness and abusiveness conclusions set out in the 2017 Final Rule. The Bureau here concludes only that, in light of the consequences that would result if the compliance date became mandatory as discussed below, the Reconsideration NPRM raised sufficiently strong reasons to justify finalizing the Bureau's proposal to delay the compliance date for the Mandatory Underwriting provisions—enough time to consider the approximately 190,000 comments that have been received in that proceeding and decide how to respond to them. The Bureau remains open to the possibility that those comments may reveal other data, research, or arguments to confirm or refute the Bureau's proposed reconsideration of the unfairness and abusiveness findings of the Mandatory Underwriting Provisions in the 2017

Final Rule. The Bureau, however, will make that determination in the context of the Reconsideration NPRM.

## *2. Disruption to Short-Term and Longer-Term Balloon-Payment Lending*

In the 2017 Final Rule, the Bureau had estimated that the Mandatory Underwriting Provisions would result in an annual loss of revenue for payday lenders of between \$3.4 billion and \$3.6 billion and an annual loss of between \$3.9 billion and \$4.1 billion for vehicle title lenders.<sup>35</sup> This represents between 62 percent and 68 percent of payday loan revenue during this period and virtually all of the revenue of short-term vehicle title lenders. Based on this finding, the Delay NPRM estimated that a 15-month delay of the compliance date for the Mandatory Underwriting Provisions would avert losses in revenues for the payday industry of between \$4.25 billion and \$4.5 billion, and losses in revenues for the title lending industry of \$4.9 billion and \$5.1 billion, compared to the baseline of the provisions going into effect in August 2019.<sup>36</sup>

The Delay NPRM stated that revenue losses of this magnitude could cause some smaller providers to exit the market and lead larger participants to consolidate their operations or make other fundamental changes to their businesses. The Delay NPRM further stated that these disruptions could have negative impacts on consumers, including restricting consumers' ability to choose the credit they prefer. The Bureau explained that it preliminarily believed that it was appropriate to avoid these potentially market-altering effects that would be associated with preparing for and complying with the Mandatory Underwriting Provisions in light of what the

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<sup>35</sup> See 84 FR 4252, 4287.

<sup>36</sup> 84 FR 4298, 4303. As explained in the analysis of costs and benefits in part VII below, the estimate of revenue loss for payday lenders assumes that lenders would be able to make loans under the principal step-down exception set forth in § 1041.6. If that was not true during the 15 months at issue here, the revenue impacts would be even greater.

Bureau believed were strong reasons for revisiting the unfairness and abusiveness determinations underlying those provisions.<sup>37</sup>

Commenters for the most part did not dispute that the Mandatory Underwriting Provisions, once in force, would have the effects on lenders described in the 2017 Final Rule. Some commenters, as set out below, suggested that the Bureau's 2017 Final Rule understated the impact on industry of the Mandatory Underwriting Provisions.

Lenders and trade associations expressed their agreement with the rationale for the proposed delay in the Delay NPRM. Lenders, a trade association, a business advocacy group, and an attorney for lenders stated that if compliance with the Mandatory Underwriting Provisions was required in August 2019, many lenders would go out of business and would likely not return to operating even if those provisions were later rescinded. Lenders, a trade association, and a credit reporting agency indicated that lenders would suffer unrecoverable losses and long-term consequences even if compliance with the Mandatory Underwriting Provisions were only required from August 2019 until the provisions were rescinded. A trade association asserted that it would be arbitrary and capricious to require temporary compliance with the Mandatory Underwriting Provisions if the provisions were fundamentally flawed at the outset.

A trade association and a law firm commented that lenders should not be required to comply with a rule that is likely to be rescinded. A lender and trade association further noted that if lenders were forced to switch underwriting practices back and forth over a short period of time because compliance with the Mandatory Underwriting Provisions was required and then those provisions were rescinded, lenders would face unnecessary costs and that consumers would

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<sup>37</sup> *Id.* at 4300.



be significantly confused regarding whether they and the lenders are able to enter into transactions that both think are in their interest. The trade association also noted that the Mandatory Underwriting Provisions would have a negative impact on competition among payday lenders.

Lenders, trade associations, and a tribal government commented that to the extent that lenders did not go out of business, the Mandatory Underwriting Provisions would significantly reduce revenues from lending operations, and that the proposed delay would protect businesses from revenue disruption. Lenders stated that to the extent that they did not go out of business, many of them would be forced to consolidate their operations or make other fundamental changes as a result of the Mandatory Underwriting Provisions. A credit reporting agency noted that any increase in costs to lenders as a result of efforts to comply with the Mandatory Underwriting Provisions would simply be passed on to consumers.

Lenders and trade associations noted that if finalized, the Delay NPRM would help lenders avoid injuries from any temporary disruptions as the Bureau contemplates revising the 2017 Final Rule. Lenders asserted that significant costs and work hours would go into complying with the Mandatory Underwriting Provisions by August 19, 2019, but that these costs and hours would not be recouped if the Bureau later rescinded these provisions. Lenders stated that the Delay NPRM was a reasonable and practical approach to avoid requiring small businesses to incur large and potentially unnecessary costs while the Bureau reconsiders the Mandatory Underwriting Provisions.

A tribal government noted that the Mandatory Underwriting Provisions would cause providers to close, resulting in unemployment, lost payroll, and property taxes.

Industry commenters, trade associations, a business advocacy group, a consumer advocacy group, and an attorney for lenders also asserted that if compliance with the Mandatory Underwriting Provisions of the 2017 Final Rule was required, millions of consumers would be harmed because they would be denied access to credit and would be forced into inferior and more costly alternatives, including defaulting on other debts and turning to less responsible lenders on less favorable terms. One business advocacy group and a trade association commented that access to small-dollar credit critically supports consumers facing immediate and pressing financial challenges. One trade association noted that in some areas, in particular rural communities, consumers are not served by traditional banks and access to short-term and longer-term balloon-payment products is vital and would be cut off if the compliance date for the 2017 Final Rule were not delayed. One lender claimed that consumers would be forced to turn to expensive, credit-damaging alternatives absent access to short-term and longer-term balloon-payment loans. One trade association asserted that the Bureau should not assign the weight that the 2017 Final Rule did to the interest of protecting consumers as soon as possible.

Consumer advocacy groups, on the other hand, generally commented that injury to industry from not delaying the Mandatory Underwriting Provisions did not outweigh injury to consumers from delaying these provisions. One consumer advocacy group claimed that in the Delay NPRM the Bureau prioritized industry profits over consumer protection and that the protection of industry is not one of the factors the Dodd-Frank Act requires the Bureau to consider in its rulemakings. The same group claimed that the Bureau could not frame its concern over industry profits at the expense of consumers as an attempt to preserve competition because the 2017 Final Rule explained how the Mandatory Underwriting Provisions were consistent with preserving competition. One consumer advocacy group asserted that the Delay NPRM was

based on purely anecdotal input on vaguely defined compliance costs and revenue losses.

Another consumer advocacy group argued that maintaining the original compliance date for the Mandatory Underwriting Provisions was consistent with maintaining an orderly implementation period.

A coalition of consumer advocacy groups, civil rights groups, religious groups, and community reinvestment groups commented that the Delay NPRM would prolong for 15 months the various harms suffered by consumers receiving loans that would not comply with the Mandatory Underwriting Provisions. These groups asserted that delay would cause a variety of impacts on consumers, including foregoing basic living expenses, vehicle repossession, aggressive debt collection by lenders, health effects (including the physical consequences of emotional distress), and reborrowing costing billions of dollars a year. In asserting the frequency of some of these harms, these commenters cited the Bureau's findings in the 2017 Final Rule. Consumer advocacy groups claimed that the delay of the compliance date for the Mandatory Underwriting Provisions would inflict the above harms particularly on communities of color, older Americans, and those on fixed incomes. Consumer advocacy groups commented that payday and vehicle title loans are debt traps by design, and that the business model for these products is not about providing access to productive credit or bridging short-term financial shortfalls. Consumer advocacy groups commented that the data show that the economic benefits from unaffordable loans are outweighed by the harms caused by the cycle of debt.

A consumer advocacy group commented that, according to the findings in the 2017 Final Rule, the Mandatory Underwriting Provisions would provide substantial benefits to consumers, reducing the harms, identified above, that consumers would otherwise suffer. An individual commenter argued that the Delay NPRM was arbitrary and capricious because it only took into

account the costs to industry of complying with the 2017 Final Rule and completely ignored the benefits to consumers that would result from compliance.

Consumer advocacy groups asserted that delay of the Mandatory Underwriting Provisions would cause severe, irreparable harm to consumers, and that consumers cannot afford to wait an additional 15 months for the relief that the Mandatory Underwriting Provisions would provide. These harms, according to the commenters, would be significantly curbed by the Mandatory Underwriting Provisions, but would continue during the 15 months of the proposed delay, causing many individuals and families to experience long-lasting and spiraling harms.

Consumer advocacy groups noted the Delay NPRM illustrates the magnitude of harm to consumers through its estimate of the benefits of delay to lenders. According to these groups, the Delay NPRM never acknowledges that its estimate of impact on industry is the inverse of its impact on consumers—that is, revenue that the delay would preserve for lenders is an additional expense to consumers. The commenters asserted that a corresponding increase in expenses to consumers is just a single component of the harms caused by unaffordable payday and vehicle title loans, including the risk of falling into debt traps, delinquency and default of loans, bank account closures, repossession of vehicles, and other long-term injuries suffered by consumers. One consumer advocacy group commented that, during the 15 month delay, title lenders would repossess an estimated 425,000 vehicles.

A consumer advocacy group commented that the Bureau's estimates in the Reconsideration NPRM that the Mandatory Underwriting Provisions of the 2017 Final Rule would reduce access to credit were unsubstantiated, and that the Bureau's analysis in the Delay NPRM did not recognize that the majority of consumers would still have access to loans with terms longer than 45 days because of the availability of small installment loans or lines of credit

with terms longer than 45 days. Another consumer advocacy group asserted that access to short-term or longer-term balloon-payment loans was not really access to new credit to the borrower or the broader economy, but was really one original unaffordable loan churned over and over again.

The Bureau concludes that delaying the August 19, 2019 compliance date for the Mandatory Underwriting Provisions would prevent industry participants from incurring substantial compliance and implementation costs and would avoid the Mandatory Underwriting Provisions' potentially market-altering effects, some of which may be irreversible, while the Bureau conducts its reconsideration rulemaking. In particular, the Bureau is concerned that some smaller storefront lenders may permanently exit the market if they are required to comply with the 2017 Final Rule, even if the Rule is later rescinded after the compliance date.<sup>38</sup> The Bureau agrees that if compliance with the Mandatory Underwriting Provisions was required in August 2019 lenders would suffer a large and potentially unrecoverable loss of revenue. The cost to industry, according to the estimates set forth in the 2017 Final Rule, would be billions of dollars in lost revenues. If compliance with the Mandatory Underwriting Provisions is required, some smaller lenders would go out of business, to the extent they cannot earn sufficient revenues and profits from other products or could not otherwise timely adapt, which would result in fewer payday storefronts as a result. The 2017 Final Rule itself acknowledges that one anticipated impact of Mandatory Underwriting Provisions would be a large contraction in the number of

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<sup>38</sup> The Bureau acknowledges that storefront lenders are already experiencing competitive pressures from online lending and multi-pay products. See, e.g., John Hecht, *State of the Industry: Innovating and Adapting Amongst a Complex Backdrop* (Jefferies Group LLC slide presentation, Mar. 20, 2019) (on file); Press Release, TransUnion, *Lenders Extending More Loans to Subprime Consumers as Credit Market Continues to Exhibit Signs of Strength: Q3 2018 TransUnion Industry Insights Report features latest consumer credit trends* (Nov. 15, 2018), <https://newsroom.transunion.com/lenders-extending-more-loans-to-subprime-consumers--as-credit-market-continues-to-exhibit-signs-of-strength/>.

payday storefronts consistent with the predicted 62 to 68 percent decline in loan revenue.<sup>39</sup>

These disruptions would likely result at least in the short-term in a significant contraction of the market for payday loans and the near elimination of the market for vehicle title loans before the Bureau had an opportunity to complete its reconsideration of the 2017 Final Rule. Further, given high fixed costs in the vehicle title lending market, some participants may not return to offering vehicle title loans if the Mandatory Underwriting Provisions were rescinded. If the Bureau does not delay the August 2019 compliance date and ultimately rescinds the Mandatory Underwriting Provisions after that date, there is a risk that the affected markets would not return to the status quo. There may be fewer competitors and less competition in the affected markets after a short period of required compliance with the Mandatory Underwriting Provisions.

Lenders that survived the impact of the Mandatory Underwriting Provisions of the 2017 Final Rule would incur, as predicted by the Rule itself, a number of operational costs from the large number of specific requirements set out by the provisions of § 1041.5, including building systems to verify income, estimate a borrower's living expenses, and project a potential borrower's residual income or debt-to-income ratio. If lenders had the option instead to make loans under § 1041.6, they still would need to establish systems for obtaining reports from a national consumer reporting agency and systems for furnishing to, and obtaining reports from, an RIS.<sup>40</sup>

The immediate contraction of the market that would likely result if compliance with the Rule became mandatory would, in turn, result in a reduction in access to credit for consumers.

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<sup>39</sup> 82 FR 54472, 54835 (“To the extent that lenders cannot replace reductions in revenue by adapting their products and practices, Bureau research suggests that the ultimate net reduction in revenue will likely lead to contractions of storefronts of a similar magnitude, at least for stores that do not have substantial revenue from other lines of business, such as check cashing and selling money orders.”); *id.* at 54827.

<sup>40</sup> *See* 84 FR 4252, 4286.

The Bureau notes, for example, that the 2017 Final Rule found that the Mandatory Underwriting Provisions would prevent some consumers from obtaining a payday loan (*i.e.*, those consumers who exhausted their ability to obtain principal step-down loans and could not qualify for an ability-to-repay loan) and would prevent substantially all consumers from obtaining vehicle title loans, which are typically for larger amounts than payday loans and available to consumers who do not have a checking account. At a minimum, those consumers would be forced to choose a different form of credit regardless of their preference.<sup>41</sup> The 2017 Final Rule further found that the Mandatory Underwriting Provisions would disrupt to some extent access to payday loans in certain geographical areas, especially in rural areas. The Rule also found that the Mandatory Underwriting Provisions would impact consumers who prefer to repay a payday loan over more than three pay periods from making that choice. Delaying the compliance date will delay all of the consequences described above until the Bureau is able to resolve the question of whether there are evidentiary or legal grounds for rescinding the Mandatory Underwriting Provisions.

The Bureau disagrees with commenters who argued that the Delay NPRM's predictions regarding access to credit were "unsubstantiated." As established above, the Delay NPRM's estimates of changes in access to credit attributable to the proposed delay were based on information from the 2017 Final Rule as analyzed by the Reconsideration NPRM.<sup>42</sup>

At the same time, the Bureau acknowledges that for some consumers there could be adverse and potentially long-lasting consequences from delaying the compliance date for the Mandatory Underwriting Provisions. Specifically, the 2017 Final Rule found that the act or

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<sup>41</sup> Contrary to the assertion of one commenter, the Reconsideration NPRM noted that information from the 2017 Final Rule did acknowledge the possibility that other lender offerings existed and could evolve further in response to the Mandatory Underwriting Provisions. *Id.* at 4285 & n.329.

<sup>42</sup> 84 FR 4298, 4302-03.

practice of making covered short-term and balloon-payment loans without assessing the consumers' ability to repay causes or is likely to cause substantial injury to consumers—principally in the form of unanticipated and repeated reborrowing—and that the Mandatory Underwriting Provisions would have the effect of preventing that injury.<sup>43</sup> The Reconsideration and Delay NPRMs accepted that finding, but emphasized that the finding does not reflect the Bureau's concerns that such injury may not constitute an unfair or abusive practice under applicable law because consumers could reasonably avoid it and understood the material risks of such harm.<sup>44</sup> The Reconsideration and Delay NPRMs likewise took as a given that the 2017 Final Rule had concluded that “the overall impacts of the decreased loan volume resulting from the 2017 Final Rule's Mandatory Underwriting Provisions on consumers would be positive,” and therefore it follows that “inverse effects would ensue, relative to the chosen baseline, from this proposal to rescind the 2017 Final Rule.”<sup>45</sup> The Bureau, however, also specifically emphasized 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 these outcomes and . . . 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

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<sup>43</sup> Lenders and trade associations commented that the 2017 Final Rule failed to provide evidence of consumer harm or substantial injury based on existing offerings of short-term and longer-term balloon-payment loans. A trade association noted that, contrary to the assumptions advanced in the 2017 Final Rule, payday loans and loan sequences benefit consumers; the trade association also noted that the high costs of such loans, without more, do not speak to consumer harm. The trade association further commented that the Bureau had failed to attempt to perform a consumer-focused analysis to determine what value borrowers receive from payday loan sequences. The Bureau is not reconsidering the finding of the 2017 Final Rule with respect to substantial injury for purposes of this rulemaking, but rather is questioning whether that injury is the result of unfair or abusive practices that justify Bureau intervention that would disrupt the market and displace consumer choice.

<sup>44</sup> 84 FR 4252, 4269-71, 4275.

<sup>45</sup> *Id.* at 4285.



and abusive.”<sup>46</sup> Contrary to the suggestion of commenters, the Bureau is not ignoring the referenced findings of the 2017 Final Rule.

However, for the reasons explained above, the Bureau has concluded that it has strong reasons to believe that those consequences are not the result of unfair or abusive practices that justify Bureau intervention that would disrupt the market and displace consumer choice. Regardless of whether the Bureau ultimately decides to rescind the Mandatory Underwriting Provisions, the Bureau now concludes that the proposed delay is appropriate based on the Bureau’s present assessment of the strength of the Reconsideration NPRM and the nature and magnitude of the consequences that would follow if compliance became mandatory before the Bureau had an opportunity to conclude the reconsideration rulemaking. The Bureau believes that the Delay NPRM should be finalized to give the Bureau time to consider fully whether it should rescind provisions that may cause potentially market-altering effects, some of which may be irreversible, before those effects occur. Absent such delay, the Bureau’s ability to reconsider the Mandatory Underwriting Provisions could, as a practical matter, be compromised.

The Bureau disagrees with the comment suggesting that its analysis of competition was a pretext for its concern over industry profits. The Bureau is concerned about effects on industry revenue and profits only to the extent that they, in turn, have an effect on competition among lenders and on consumers’ ability to access credit of the type and on the terms they prefer. The Bureau also disagrees with the comment that the Delay NPRM only vaguely or anecdotally defined the impact of the 2017 Final Rule on compliance costs and revenue losses. The 2017 Final Rule described in detail the multi-billion dollar impact of the Mandatory Underwriting Provisions on loan volumes and revenues, and the Delay NPRM was based on those findings.

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<sup>46</sup> *Id.*

The Bureau also disagrees with the comment that the Delay NPRM should have acknowledged that its estimates of the proposed delay's impact on industry were the inverse of its impact on consumers. The payday lender revenues at issue are the finance charge the lender charges the consumer for the use of the lender's money. The finance charges lenders would forego if compliance became mandatory are amounts that consumers would have paid to lenders. However, the consequences that the Bureau is concerned with here are the potentially market-altering effects, some of which may be irreversible, that would result from disrupting these payments and the resulting effects on consumers' access to credit and ability to make their own choices. Given the Bureau's strong reasons for questioning the factual and legal predicates for the Mandatory Underwriting Provisions, the Bureau concludes that it is appropriate to delay those consequences to allow the Bureau to reconsider the Mandatory Underwriting Provisions.

### *3. Reconsideration is a Valid Basis for Delay*

A number of comments opined on whether reconsideration of a substantive regulation was a valid ground for delaying the compliance date of that regulation. A lender and a consumer advocacy group commented that reconsideration of an existing regulation is an equitable, fair, and sensible reason to delay a compliance date, as the Bureau has proposed to do.

A group of State attorneys general, consumer advocacy groups, and an individual commenter asserted that reconsideration of a rule is not an adequate basis for delay. In making this argument, the consumer advocacy groups cited cases in which courts vacated rules that delayed compliance dates for existing regulations that had not yet gone into effect.

A group of State attorneys general and consumer advocacy groups commented that the Administrative Procedure Act imposes a number of specific procedural requirements on an agency seeking to change its regulation, that an agency must provide reasoned analysis for its

decision to change a regulation, and that the required reasoned analysis cannot be avoided by staying the implementation of a final rule. The group of State attorneys general and consumer advocacy groups cited case law for the proposition that a delay of a substantive regulation could not be justified with a less stringent or thorough review than other rulemakings under the Administrative Procedure Act. Finally, the group of State attorneys general asserted that the Bureau cannot use the purported proposed future revision, which has yet to be passed, as a justification for the delay of a regulation, and that a delay must be justified on its own merits. A consumer advocacy group commented that while agencies regularly reconsider rules, the authority to reconsider rules does not in itself convey to the agency the authority to delay an existing rule. According to the group of State attorneys general, consumer advocacy groups, and an individual, the Delay NPRM fails to satisfy Administrative Procedure Act requirements.

Consumer advocacy groups commented that delaying the Mandatory Underwriting Provisions of the 2017 Final Rule would be tantamount to early adoption of the rescission proposed by the Bureau in its Reconsideration NPRM, and that the Bureau can only rescind the Mandatory Underwriting Provisions by seeking and considering comments on the merits of the reconsideration. A consumer advocacy group asserted that the Delay NPRM assumed the validity and ultimate implementation of the Reconsideration NPRM and that the Bureau was not entitled to assume that the Mandatory Underwriting Provisions would be repealed such that industry compliance with them would be unnecessary, given the flaws in the Reconsideration NPRM. Further, the consumer advocacy group asserted that acting based on flawed assumptions is a cardinal example of arbitrary and capricious rulemaking.

The Bureau believes that if an agency has offered a strong and reasoned basis for reconsideration, and seeks delay to provide for an opportunity for notice and comment on the

reconsideration of the underlying regulation before significant costs associated with compliance are incurred, such reconsideration of an existing regulation is an appropriate grounds to delay a compliance date—at least where, as here, there would be potentially market-altering effects, some of which may be irreversible, absent a delay. The Bureau also believes that such a reconsideration of an existing regulation can be an adequate basis for delay and that it has complied with the Administrative Procedure Act requirements for delaying the compliance date of a regulation.

The Bureau understands that agencies must engage in reasoned analysis to support proposed delays. The Bureau has done so here. As set out in the sections above, the Delay NPRM relied on the Bureau’s clearly identified rationales for proposing to rescind the Mandatory Underwriting Provisions of the 2017 Final Rule without concluding that it would rescind those provisions. The Delay NPRM further articulated the Bureau’s reasons for proposing to postpone the compliance date while the reconsideration rulemaking is moving forward. While many commenters dispute the rationales set out in the Reconsideration NPRM, the Bureau has articulated them clearly enough that commenters were able to understand the Bureau’s preliminary grounds for proposing rescission of the Mandatory Underwriting Provisions and submit responsive comments to help the Bureau decide whether to go forward with the Reconsideration NPRM. The Delay NPRM, in turn, relied upon those preliminary grounds in proposing a limited delay of the compliance date for the Mandatory Underwriting Provisions for purposes of avoiding disruptive and potentially market-altering effects, some of which may be irreversible, while the Bureau reviews comments on the rationales set forth in the Reconsideration NPRM.

The Bureau believes that the compliance date delay is appropriate to allow for meaningful reconsideration of the 2017 Final Rule. Absent such a delay, the Bureau is concerned that the Mandatory Underwriting Provisions could have disruptive and potentially market-altering effects, some of which may be irreversible.<sup>47</sup> The risk of this outcome is confirmed by the comments received, as set out in part III.B.2, from lenders and trade associations who indicated that they or their members would go out of business permanently if compliance with the Mandatory Underwriting Provisions was required on August 19, 2019. Therefore, the Bureau believes that a delay of the compliance date is important to complete a meaningful reconsideration.

The Bureau disagrees with the assertion that finalization of the Delay NPRM is tantamount to early adoption of the Reconsideration NPRM. The Bureau has proposed a limited delay to the compliance date of 15 months to consider comments on the Reconsideration NPRM. This delay is not indefinite—compliance with the Mandatory Underwriting Provisions will be required as of the new compliance date unless the Bureau decides rescind those provisions via the reconsideration rulemaking.

#### *4. Length of the Proposed Delay*

Several commenters opposing the proposed delay noted that the 2016 Proposal, which was later finalized as the 2017 Final Rule, had a 15-month compliance period, and that the Bureau subsequently extended the period by an additional six months in the 2017 Final Rule. One commenter noted that the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) gave credit card issuers nine months to comply with major new consumer

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<sup>47</sup> The Bureau noted its concern in the Delay NPRM that the proposed delay would “allow industry participants to avoid irreparable injury from the compliance and implementation costs and the market effects associated with preparing for and complying with portions of the Rule that the Bureau is proposing to rescind.” 84 FR 4298, 4300.

protections, including an ability-to-repay requirement,<sup>48</sup> and that changes to State laws with a more substantial impact on the payday and title lending industries typically provide only three to nine months for full implementation. These commenters argued that industry participants' renewed requests for more time do not justify further extension of what they consider an already lengthy implementation period, or that even if compliance challenges posed as a reason for delay (with the commenters also asserted that here they do not), they certainly cannot justify a delay of an additional 15 months. Relatedly, they argued that the industry complaints cited by the Bureau bear no relationship to the proposed 15-month delay, asserting that the Bureau's focus on these issues appears to be an attempt to support a result the agency has already determined.

A group of State attorneys general claimed that the Bureau offered, in the 2017 Final Rule, a legitimate and appropriate analysis justifying the amount of time the rule provided industry to comply with the Mandatory Underwriting Provisions, and that the reasons the Delay NPRM offered contradicted its own prior analysis. One consumer advocacy group claimed that the length of the delay the Bureau proposed does not square with the reason the Bureau suggests for such delay, *i.e.*, that the delay proposed by the Bureau for considering and potentially finalizing the Reconsideration NPRM was more time than the Bureau took to finalize the 2017 Final Rule, which the group argued was a more complex and difficult rulemaking. Commenters supportive of the Bureau's proposal largely agreed that 15 months was an appropriate length of time for the delay. Several commenters, however, suggested that the Bureau delay for a longer period (such as 21 or 22 months, or until December 31, 2021) or that the extension of the compliance date should not begin until something else occurs (such as the completion of the reconsideration rulemaking or the lifting of the stay in the pending litigation challenging the

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<sup>48</sup> Public Law 111-8, sections 3 and 109, 123 Stat. 1734 (2009), *codified at* 15 U.S.C. 1665e.

Rule). One commenter asserted that a delay shorter than 22 months would threaten serious and irreparable harm to both payday and title lenders as well as the consumers who rely on them for credit, and further asserted that such an extension would suffice only if one assumes (incorrectly, in the view of this commenter) that the original compliance period was adequate.

One commenter asserted that the Bureau did not explain how it arrived at a decision to propose a 15-month delay, while simultaneously quoting the Bureau's explanation that the Bureau was proposing a 15-month delay in order to permit an orderly conclusion to its separate rulemaking process to reconsider the Mandatory Underwriting Provisions of the 2017 Final Rule.<sup>49</sup>

The Bureau continues to believe that 15 months is an appropriate length of time to delay the August 19, 2019 compliance date for the Mandatory Underwriting Provisions of the Rule, in order to permit an orderly conclusion to the reconsideration rulemaking process. In addition, the Bureau believes that providing a date certain for the delay will provide more certainty and clarity to all relevant stakeholders in this context.

The comment period for the Reconsideration NPRM closed on May 15, 2019, and the Bureau received approximately 190,000 comments. The Bureau believes that the 15-month delay will give the Bureau sufficient time to review the comments received, make a determination as to how to proceed in that rulemaking, and to prepare, issue, and publish in the **Federal Register** a final rule sufficiently in advance of the November 19, 2020 compliance date to allow the final rule to take effect by that date (if the Bureau elects to rescind the Mandatory

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<sup>49</sup> See 84 FR 4298, 4299. The Bureau also explained in the Delay NPRM that it preliminarily believed, based on its experience writing the 2017 Final Rule and with other similar rulemakings, that the proposed compliance date of November 19, 2020 would allow the Bureau adequate opportunity to review comments on its Reconsideration NPRM regarding the Mandatory Underwriting Provisions of the 2017 Final Rule and to make any changes to those provisions before affected entities bear additional costs associated with implementing and complying with the 2017 Final Rule, and related market effects. *Id.* at 4301.

Underwriting Provisions).<sup>50</sup> This timeframe is not inconsistent with the Bureau’s timing for issuing final rules where the proposal garnered a significant volume of comments. For example, the Bureau’s rule governing prepaid accounts under Regulations E and Z, which received approximately 65,000 comments, took approximately 20 months from the close of the comment period to publication, with an effective date approximately one year later (although the overall effective date was ultimately extended an additional 1.5 years, to April 1, 2019).<sup>51</sup>

### *C. Other Aspects of the Delay NPRM*

#### *1. Unanticipated Potential Obstacles to Compliance*

As discussed in the Delay NPRM, the Bureau’s second reason for proposing to delay the compliance date of the Mandatory Underwriting Provisions was that the Bureau had discussed implementation efforts with a number of industry participants since publication of the 2017 Final Rule. Through these conversations, the Bureau had received reports of various unanticipated potential obstacles to compliance with the Mandatory Underwriting Provisions by the August 19, 2019 compliance date. The Bureau sought to better understand these reported obstacles and how they might bear on whether the Bureau should delay the August 19, 2019 compliance date for the Mandatory Underwriting Provisions while it considers whether to rescind those portions of the 2017 Final Rule. In the Delay NPRM, the Bureau specifically discussed recent changes to State laws and systems or vendor-related issues as examples of potential obstacles to compliance.

Commenters, including lenders, trade associations, consumer advocacy groups, a group of State attorneys general, the SBA OA, and others, spoke to potential obstacles to compliance

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<sup>50</sup> Under the Congressional Review Act, before a rule can take effect, an agency must submit the rule to both Houses of Congress and the Comptroller General. 5 U.S.C. 801(a). Prior to this submission, an agency must obtain a determination from the Office of Management and Budget (OMB) as to whether the rule is a “major rule” under 5 U.S.C. 804(2). If OMB so determines, the rule generally cannot take effect until the later of 60 days after Congress receives the rule or the rule is published in the **Federal Register**.

<sup>51</sup> See 81 FR 83934 (Nov. 22, 2016), 82 FR 18975 (Apr. 25, 2017), 83 FR 6364 (Feb. 13, 2018).



generally, changes to State laws enacted after the 2017 Final Rule was issued, and systems or vendor-related issues, including such issues specifically related to RISes. Some lenders, trade associations, and an attorney to lenders asserted that the proposed delay is necessary even if the Bureau decides not to rescind the Mandatory Underwriting Provisions. Lenders and trade associations asserted that they would not be ready to comply with the Mandatory Underwriting Provisions by August 2019 and were deterred from making the significant investment in compliance by uncertainty about the compliance date. However, commenters provided little, if any, data or other specific information to support the existence or magnitude of these or other obstacles to compliance.<sup>52</sup> In light of the absence of such data or information in the rulemaking record, the Bureau is not basing its final rule to delay the compliance date on the presence or effect of obstacles to compliance, but rather is basing it on the need to conduct an orderly rulemaking with regard to the Reconsideration NPRM.<sup>53</sup>

## *2. Crossover Effects*

The Bureau received a number of comments that addressed crossover effects of the proposed delay of the Mandatory Underwriting Provisions on the implementation of the Payment Provisions.

A comment from a group of State attorneys general expressed some confusion about the request for comment on crossover effects. Nevertheless, the comment stated that the compliance

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<sup>52</sup> Some commenters noted that lenders had expected to be able to comply with the Mandatory Underwriting Provisions through the use of third-party vendor and software services but stated that those are not currently available in the marketplace. The lenders, however, did not provide specific information as to the costs they would be likely to incur were they to comply with the Mandatory Underwriting Provisions in the absence of such third-party services.

<sup>53</sup> Some commenters also asserted that compliance with the Mandatory Underwriting Provisions would be impossible in the absence of RISes. The general standard for making an ability-to-repay determination under § 1041.5, however, does not require that lenders obtain a consumer report from an RIS if such a report is not available.

date for the Payment Provisions should not be delayed and those provisions should go into effect as scheduled on August 19, 2019. They asserted that they were unaware of any circumstance where a high-cost lender does not act in an unfair and abusive manner by making more than two consecutive failed efforts to withdraw payments from a consumer's account without first obtaining new consumer authorization.

On the other hand, trade association and industry commenters contended that crossover effects existed and were reasons to delay or reconsider the compliance date for the Payment Provisions. Industry commenters stated that the 2017 Final Rule established a complex and interconnected set of provisions that covers various categories of covered loans. Given these interconnections, a number of commenters stated that the proposed delay of the Mandatory Underwriting Provisions potentially could impact the Payment Provisions, leading to confusion and unintended consequences for consumers and industry. Commenters stated that because of the complicated distinctions and overlapping definitions of covered loans, reconsideration of the Mandatory Underwriting Provisions could result in potential complications for industry with respect to compliance obligations and operations. Commenters asserted that such complications would be particularly likely if the Reconsideration NPRM resulted in modifications to the definitions or exemptions of covered loans.

A trade association stated that Payment Provisions cover a wider range of covered loans than the Mandatory Underwriting Provisions and therefore will impact more consumers and industry participants. Given this consequence for consumers and industry, the trade association urged the Bureau to delay and reconsider the Payment Provisions.

The Bureau has reviewed and analyzed these comments and has determined that they do not identify crossover effects on implementation of the Payment Provisions such that the Bureau should delay parts of the Rule other than the Mandatory Underwriting Provisions.

The Bureau disagrees with the comments asserting that finalizing the Delay NPRM would have crossover effects on the implementation of the Payment Provisions. The commenters in general did not identify specific or definite examples of crossover effects. Further, commenters generally did not identify with specificity negative or unintended consequences to consumers or industry that would arise from any such effects.

As to comments that said that changes to the 2017 Final Rule's covered loan definition could have potential crossover effects, the Bureau acknowledges that the Payment Provisions apply to a broader group of covered loans than do the Mandatory Underwriting Provisions, and if the Bureau undertook changes to narrow the 2017 Final Rule's coverage those changes could impact implementation. However, neither the Delay NPRM nor the Reconsideration NPRM proposed changes to the scope of the 2017 Final Rule's coverage. Additionally, the Delay NPRM did not propose delaying provisions that generally implement the covered loan definition. Further, commenters did not explain how the proposed rescission of the Mandatory Underwriting Provisions would in practice affect the covered loan definition in the Rule.

Having considered these comments, the Bureau concludes that delaying the Mandatory Underwriting Provisions will not result in significant crossover effects on implementation of the Payment Provisions.

Regarding comments about industry burden directly resulting from the Payment Provisions, which include comments about those provisions' compliance costs and market impacts, the Bureau considers these comments outside the scope of the proposal. The Bureau

did not propose in the Delay NPRM to delay the compliance date for the Payment Provisions.<sup>54</sup> Rather, the Bureau specifically solicited comment about whether and to what extent delaying the compliance date of the Mandatory Underwriting Provisions would impact implementation of the Payment Provisions.<sup>55</sup> Comments about the Payment Provisions' industry burden in general are not responsive to this request for comment. However, as noted in both NPRMs, the Bureau has also received formal and informal feedback regarding the Payment Provisions.<sup>56</sup> As indicated in those NPRMs, the Bureau intends to examine issues raised by this feedback and determine whether further action is warranted.

#### *D. Other Issues Raised by Commenters*

##### *1. Bureau Statements Regarding the Rule and the Litigation Stay*

Commenters argued that a compliance date delay is needed because a “cloud of uncertainty” has hung over the rule since it was published in 2017 and that as a result most lenders have deferred taking necessary steps to implement the Mandatory Underwriting Provisions. Commenters cited, variously, statements made by the Bureau or the then-Acting Director, the filing of the lawsuit challenging the Rule in April 2018, and the court’s stay of the Rule’s compliance date in November 2018. One commenter asserted that this uncertainty has prevented banks from being able to adequately design compliance programs.

One commenter noted that the court’s stay of the compliance date remains in force, but could be lifted at any time, arguing that because of this uncertainty, the stay does not ameliorate concerns about the August 19, 2019 compliance date. Another commenter asserted that at this stage it would be inequitable for lenders to be required to commence implementation of costly

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<sup>54</sup> See 84 FR 4298, 4301.

<sup>55</sup> See *id.*

<sup>56</sup> See *id.* See also 84 FR 4252, 4253, 4260.

compliance systems and undertake other measures required to become compliant, especially if the stay of the Rule is lifted by the court, and that the likely result would be that smaller storefront lenders would exit the business.

A consumer advocacy group commented that the Bureau failed to explain related decisions by the agency that could inform commenters' reaction to the Delay NPRM, noting that the Bureau did not explain that it had itself asked the court to stay the Rule's compliance date or explain the Bureau's assumptions about the relationship between that litigation and the Delay NPRM.

The Bureau acknowledges that its statements and pending litigation have created greater uncertainty for industry and consumers. However, the Bureau did not propose these issues as possible grounds for delaying the compliance date, and is not relying on them here to finalize the compliance date delay.

## *2. Decreased Consumer Complaints*

In the Reconsideration NPRM, the Bureau noted that changes to State-level regulation may have contributed to the decline in payday lending complaints that the Bureau handled through its Office of Consumer Response.<sup>57</sup> Several commenters suggested in their comments

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<sup>57</sup> 84 FR 4252, 4254-55. 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. 82 FR 54472, 54483, *citing* 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\\_cfbp\\_Consumer-Response-Annual-Report-2016.PDF](https://www.consumerfinance.gov/documents/3368/201703_cfbp_Consumer-Response-Annual-Report-2016.PDF).

In contrast, the Bureau received approximately 2,900 payday loan complaints in 2017, and approximately 2,300 in 2018. 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. Bureau of Consumer Fin. Prot., *Consumer Response Annual Report, Jan. 1–Dec. 31, 2017*, at 34 (March 2018), [https://www.consumerfinance.gov/documents/6406/cfbp\\_consumer-response-annual-report\\_2017.pdf](https://www.consumerfinance.gov/documents/6406/cfbp_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., *Semi-Annual Report of the Bureau of Consumer Financial Protection*, at 19 tbl. 3 (Fall 2018), [https://www.consumerfinance.gov/documents/7266/cfbp\\_semi-annual-report-to-](https://www.consumerfinance.gov/documents/7266/cfbp_semi-annual-report-to-)

on the Delay NPRM that the Bureau should delay the compliance date of the Mandatory Underwriting Provisions to see if the downward trend in consumer complaints continues and whether State regulation is adequate to protect consumers without limiting access to credit. The Bureau will continue to monitor complaint volumes, but is not basing its decision to delay on these grounds.

### 3. UDAAP Rulemaking Generally

One commenter suggested that the Bureau should adopt definitive UDAAP standards through a standalone notice-and-comment rulemaking process before promulgating and implementing specific rules relying on what the commenter referred to as shifting and unsettled interpretations of unfairness and abusiveness. The commenter also asserted that applying new or revised UDAAP interpretations on an ad hoc basis is arbitrary and capricious as well as an inappropriate way to make regulatory policy.

The Bureau indicated in its fall 2018 semiannual regulatory agenda that it is considering whether rulemaking or other activities may be helpful to further clarify the meaning of “abusiveness” under the section 1031 of the Dodd-Frank Act.<sup>58</sup> This issue remains on the Bureau’s list of long-term actions.<sup>59</sup> The Bureau also recently announced that the first in an upcoming series of symposia that the Bureau is hosting will focus on clarifying the meaning of abusive acts or practices under section 1031 of the Dodd-Frank Act.<sup>60</sup>

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[congress\\_fall-2018.pdf](#). 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 frequently be in the debt collection product category rather than the payday loan product category.

<sup>58</sup> 83 FR 58118, 58120 (Nov. 16, 2018).

<sup>59</sup> See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=3170-AA88>.

<sup>60</sup> See Bureau of Consumer Fin. Prot., *Consumer Financial Protection Bureau Announces Symposia Series* (Apr. 18, 2019), <https://www.consumerfinance.gov/about-us/newsroom/bureau-announces-symposia-series/>.

At this time, the Bureau has not yet decided whether it will take measures to address the general meaning of abusiveness. The Bureau believes that its Reconsideration NPRM proposes an interpretation of unfairness and abusiveness that is focused on the unique characteristics of the markets for the loans at issue. The Bureau does not consider this comment relevant to the specific issue presented in the rulemaking, which is whether the compliance date of the Mandatory Underwriting Provisions should be delayed. The Bureau already issued the Mandatory Underwriting Provisions as part of the 2017 Final Rule without the standalone rulemaking process desired by the commenter, and it is delaying the compliance date in order to reconsider those provisions.

#### *4. Tribal Consultations and Interagency Coordination*

Several commenters requested additional tribal government consultations regarding the Rule, both NPRMs, and/or tribal lending generally. Several other commenters requested that the Bureau coordinate with the prudential regulators to create a unified framework for regulating the small-dollar credit market. The Bureau will continue to coordinate and consult with tribal governments and with the prudential regulators as required by sections 1015 and 1022(b)(2)(B) of the Dodd-Frank Act and in accordance with the Bureau's frameworks on tribal government and interagency consultations.

#### *5. Prejudgment of the Outcome of this Rulemaking and Stakeholder Influence on Rulemaking*

Several commenters opposing the delay suggested that the Bureau might have prejudged the outcome of the Delay NPRM, arguing that the Bureau's actions (including the Bureau's statements regarding the rule, lack of an approved Office of Management and Budget (OMB) Control Number under the Paperwork Reduction Act of 1995 (PRA), and posture in the pending litigation) suggests that the Bureau decided to delay the Mandatory Underwriting Provisions

before it issued the Delay NPRM. Commenters also asserted that the Reconsideration NPRM lacks support and rests on what one referred to as biased and contaminated input due to meetings that they asserted occurred prior to issuance of the NPRMs. They also noted recent media reports regarding the influence of the payday lending industry on academic studies and thereby purportedly on the Bureau's rulemaking. One commenter noted the difficulty in determining such industry influence on academic work and the rulemaking process, and suggested that the Bureau conduct a thorough investigation of all pro-industry studies reviewed or relied upon in connection with both NPRMs to ascertain whether there has been any industry influence on such purportedly independent work.

The Bureau issued NPRMs seeking comment on whether it should delay the compliance date of the Mandatory Underwriting Provisions as well as whether it should rescind those provisions. The Bureau's Director has stated multiple times that she has an open mind about the outcome of both rulemakings.<sup>61</sup> The Bureau regularly meets with representatives of industry, consumer advocacy groups, and other interested stakeholders at various points throughout the rulemaking process.<sup>62</sup> The Bureau summarized in the Delay NPRM the information on which it was relying that it had received from industry regarding the possible need for a delay of the compliance date for the Mandatory Underwriting Provisions, thus making that information part of the record and inviting public comment on it. As discussed elsewhere in this notice, the

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<sup>61</sup> See, e.g., Bureau of Consumer Fin. Prot., *Consumer Financial Protection Bureau Releases Notices of Proposed Rulemaking on Payday Lending* (Feb. 6, 2019), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-releases-notices-proposed-rulemaking-payday-lending/> (“The Bureau will evaluate the comments, weigh the evidence, and then make its decision,” said Kathy Kraninger, Director of the Consumer Financial Protection Bureau.”).

<sup>62</sup> When these meetings occur while a rulemaking is pending, it is the Bureau's policy to disclose the existence and content of such meetings that impart information or argument directed to the merits or outcome of the rulemaking, consistent with its written policy. See Bureau of Consumer Fin. Prot., *Policy on Ex Parte Presentations in Rulemaking Proceedings*, 82 FR 18687 (April 21, 2017).



public has used this opportunity to provide the Bureau with extensive and useful comments concerning the issues raised in the Delay NPRM.

In its rulemaking proceedings, including those relating to the 2017 Final Rule and the ongoing reconsideration of the Mandatory Underwriting Provisions in that Rule, the Bureau considers a broad range of information. Many stakeholders, including members of industry, trade associations, consumer advocacy groups, government agencies, and others, fund studies bearing on issues relevant to Bureau rulemakings. The Bureau conducts its own evaluation and analysis of the data presented in these studies, and draws its own conclusions about them. The Bureau does not believe that any information (including in media reports) it has received or reviewed since the issuance of the Reconsideration and Delay NPRMs undercuts the Bureau's preliminary determination to reconsider the weight it gave to certain studies (such as the Mann Study and Pew Study).

#### *6. Comments Outside the Scope of the Proposal*

As the Bureau indicated in the Delay NPRM, the purpose of that notice was to seek comment on whether the Bureau should delay the August 19, 2019 compliance date for the Mandatory Underwriting Provisions. The Bureau did not propose to delay the compliance date for the other provisions of the 2017 Final Rule, including the Payment Provisions.<sup>63</sup>

Nonetheless, many commenters addressed issues related to payments or the scope of the Rule more generally in their comment letters. A number of commenters, including lenders, trade

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<sup>63</sup> In the Delay NPRM, the Bureau noted that, through its efforts to monitor and support industry implementation of the 2017 Final Rule, it had heard concerns from some stakeholders regarding the Rule that were outside of the scope of the proposal. For example, the Bureau noted that it had 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. *See* 84 FR 4298, 4301.

associations, tribal governments, the SBA OA, and others, requested that the Bureau: (1) delay the compliance date for the Payment Provisions or for the Rule as a whole; (2) make modifications to the Payment Provisions or revise the scope of covered loans or entities to which the Rule applies; and/or (3) rescind the entire Rule. In addition, several commenters suggested that the Payment Provisions should be reassessed in light of the Reconsideration NPRM's proposed approach to unfairness and abusiveness, asserting that the Payment Provisions are predicated on the 2017 Final Rule's approach to unfairness and abusiveness, which the Reconsideration NPRM preliminarily deemed problematic.

As the Bureau noted in the Delay NPRM, the Bureau intends to separately examine these issues and the Bureau will determine whether further action is warranted (which may include issuing a request for information or an advance notice of proposed rulemaking relating to these issues). These comments are outside the scope of this final rule, and thus the Bureau is not delaying the compliance date for the Payment Provisions or making any of the other requested modifications to the Rule.

#### **IV. Legal Authority**

The legal authority for the 2017 Final Rule is described in detail in part IV of the **SUPPLEMENTARY INFORMATION** accompanying the 2017 Final Rule.<sup>64</sup> That discussion may be referred to for more information about the legal authority for this final rule.

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 to identify and prohibit unfair and abusive practices.<sup>65</sup> Accordingly, in finalizing this rule, the

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<sup>64</sup> 82 FR 54472, 54519-24.

<sup>65</sup> 12 U.S.C. 5531(b).

Bureau is exercising its authority under Dodd-Frank Act section 1031(b) to prescribe rules under Title X of the Dodd-Frank Act.

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 in the 2017 Final Rule.<sup>66</sup> 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 issued under section 1031, as the Bureau determines is necessary or appropriate to carry out the purposes and objectives of Title X.<sup>67</sup> 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.<sup>68</sup> The term Federal consumer financial law includes rules prescribed under Title X of the Dodd-Frank Act, including those prescribed under section 1031.<sup>69</sup> 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.<sup>70</sup>

Section 1031 of the Dodd-Frank Act and each of the other legal authorities that the Bureau relied upon in the 2017 Final Rule provide the Bureau with discretion to issue rules and

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<sup>66</sup> See 82 FR 54472, 54522.

<sup>67</sup> 12 U.S.C. 5512(b)(3)(A).

<sup>68</sup> 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.

<sup>69</sup> 12 U.S.C. 5481(14).

<sup>70</sup> 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. 5532.

therefore discretion in setting compliance dates for those rules. In the 2017 Final Rule, the Bureau stated that the Rule’s compliance date was “structured to facilitate an orderly implementation process.”<sup>71</sup> In particular, the Bureau sought “to balance giving enough time for an orderly implementation period against the interest of enacting protections for consumers as soon as possible.”<sup>72</sup> As discussed above and in the Reconsideration NPRM, the Bureau believes that there are strong reasons for rescinding the Mandatory Underwriting Provisions of the Rule on the grounds, *inter alia*, that a more robust and reliable evidentiary record is needed to support a rule that would have such dramatic impacts on the market, and that the findings of an unfair and abusive practice as set out in § 1041.4 of the 2017 Final Rule rested on applications of the relevant standards that the Bureau should no longer use. Thus, the Bureau believes that delaying the compliance date would be consistent with the “orderly implementation period,” given that the Bureau has strong reasons to rescind the Mandatory Underwriting Provisions.

Moreover, the Bureau concludes, for purposes of this final rule, that it should not assign the weight that it did in the 2017 Final Rule to “the interest of enacting protections for consumers as soon as possible.” This is because the Bureau has strong reasons to believe that the 2017 Final Rule was not the best application of the statutory scheme in section 1031 of the Dodd-Frank Act that is designed to protect that interest.

A trade association commented that the Bureau’s authority to delay the implementation of the 2017 Final Rule is firmly grounded in section 1031(b) of the Dodd-Frank Act. The trade association asserted that because section 1031(b) provided that the Bureau “may prescribe rules” identifying unfair, deceptive or abusive acts or practices, Congress intended to give the Bureau

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<sup>71</sup> 82 FR 54472, 54474.

<sup>72</sup> *Id.* at 54814.

the discretionary authority to decide when such rules should be implemented and when the Bureau should enforce compliance with such rules. Further, the commenter claimed that the Bureau was right to take the view that it should not assign the weight that it did in the 2017 Final Rule to the interest of enacting protections for consumers as soon as possible given its preliminary findings about the Mandatory Underwriting Provisions of the 2017 Final Rule.

An individual commenter and consumer advocacy groups asserted that the Bureau did not have the authority to delay the 2017 Final Rule. An individual commenter claimed that the Bureau could not use its “discretion” under section 1031 or other statutory sources as a legal authority to delay the compliance date. The individual commenter further claimed that the Bureau failed to identify specific legal authorities conferred by Congress that would permit the Bureau to delay the 2017 Final Rule, absent which the Bureau’s proposed delay would be arbitrary and capricious under the Administrative Procedure Act. The individual commenter claimed that there was no history prior to 2017 for compliance date delays, other than one identified by the commenter that was issued in 2003 by the Office of the Comptroller of Currency, which the Bureau did not cite. The individual commenter also asserted that the Delay NPRM was arbitrary and capricious because section 705 of the Administrative Procedure Act only permits a stay of an existing rule pending judicial review if justice so requires, but the litigation over the 2017 Final Rule in the Federal district court in Texas did not justify such a stay because that case has already been stayed by the court. A consumer advocacy group asserted that, by way of analogy, the Bureau could not demonstrate under the standard established by section 705 of the Administrative Procedure Act a likelihood of success on the merits if the Reconsideration NPRM were finalized and subject to judicial review.

The Bureau concludes, contrary to the views of some commenters, that it has the discretionary authority to delay the 2017 Final Rule. Accordingly, the Bureau also agrees with the commenters who argued that section 1031(b) of the Dodd-Frank Act confers upon the Bureau the authority to reconsider or delay rules that the agency has issued based on findings of unfair, deceptive or abusive acts and practices. The Bureau further concludes that it properly identified in the Delay NPRM the specific legal authorities that it relied on to delay the 2017 Final Rule; those authorities were identified in the Legal Authorities section of the Delay NPRM and are set forth above. Finally, the Bureau does not rely on section 705 of the Administrative Procedure Act in issuing this rule, and that section is not otherwise relevant to this rulemaking.

## **V. Section-by-Section Analysis**

As discussed above, the 2017 Final Rule became effective on January 16, 2018, but had a compliance date of August 19, 2019 for §§ 1041.2 through 1041.10, 1041.12, and 1041.13. The Bureau proposed to delay the August 19, 2019 compliance date to November 19, 2020 for §§ 1041.4 through 1041.6, 1041.10, 1041.11, and 1041.12(b)(1)(i) through (iii), (b)(2) and (b)(3). Sections 1041.4 through 1041.6 govern underwriting, with § 1041.4 identifying an unfair and abusive practice, § 1041.5 governing the ability-to-repay determination, and § 1041.6 providing a conditional exemption from §§ 1041.4 and 1041.5 for certain covered short-term loans. Section 1041.10 governs information furnishing requirements and § 1041.11 addresses RISes.<sup>73</sup> Section 1041.12 sets forth compliance program and record retention requirements, with

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<sup>73</sup> The Bureau is not delaying the compliance date for § 1041.11, as discussed below, because the 2017 Final Rule did not provide for an August 19, 2019 compliance date for that section; its operative date was January 16, 2018. However, the Bureau is revising certain dates that appear in the regulatory text of § 1041.11 to reflect the delayed compliance date for the Mandatory Underwriting Provisions.

§ 1041.12(b)(1) through (3) detailing record retention requirements that are specific to the Rule's Mandatory Underwriting Provisions.<sup>74</sup>

In the Delay NPRM, the Bureau sought comment on whether it had identified the appropriate provisions of the 2017 Final Rule as constituting the Mandatory Underwriting Provisions for purposes of the proposed delay, as well as whether it should amend the Rule's regulatory text or commentary to expressly state the delayed compliance date for the Mandatory Underwriting Provisions and/or the unchanged date for the Payment Provisions.

Several commenters agreed that the Bureau had identified the correct provisions to delay. One commenter requested that the Bureau amend the Rule itself to expressly state the delayed compliance date. Another commenter, however, argued that there was no reason to change the compliance date for § 1041.11, noting that unlike the rest of the rule, this section was set to be fully effective and implemented as of January 16, 2018 and that it does not impose any mandatory implementation costs. The commenter further stated that the Bureau has provided no reason it should shutter its own system for processing RIS applications, and that if the Bureau stalled the RIS application it would suggest the Bureau has prejudged the outcome to the Reconsideration NPRM.

The long-passed January 16, 2018 date for § 1041.11 should not be, and is not being, altered. As discussed above, the Bureau proposed to delay the August 19, 2019 compliance date for the Mandatory Underwriting Provisions; it did not propose to alter any other dates associated with those provisions. To avoid any potential confusion, however, the Bureau is not including

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<sup>74</sup> In the Reconsideration NPRM, the Bureau proposed to modify the introductory text of § 1041.12(b)(1) for clarity as to its application to loan agreements for all covered loans, and thus it was not listed with the provisions that the Bureau proposed to rescind. Since the Bureau is not modifying the introductory text of § 1041.12(b)(1) in this final rule, it is included in the list of provisions for which the compliance date is delayed.

§ 1041.11 in the various lists that appear throughout this notice of the sections for which it is delaying the compliance date (other than those reiterating language used in the Delay NPRM).

In this final rule, the Bureau is delaying the August 19, 2019 compliance date to November 19, 2020 for §§ 1041.4 through 1041.6, 1041.10, and 1041.12(b)(1) through (3).<sup>75</sup> To implement this compliance date delay, the Bureau is revising the few instances in the regulatory text and commentary where the August 19, 2019 compliance date appears. The Bureau is also adding new § 1041.15 to expressly state the Rule’s effective and compliance dates. In addition, as noted above, the Bureau is also making certain corrections to address several clerical and non-substantive errors it has identified in the 2017 Final Rule, in §§ 1041.2(a)(9), 1041.3(e)(2), 1041.9(c)(3)(viii), and appendix A.<sup>76</sup> No substantive change is intended by these corrections.

Each of these revisions and additions is discussed in turn in the section-by-section analyses that follow.

### *Subpart A—General*

#### *§ 1041.2 Definitions*

Section 1041.2 provides definitions for the Rule. The term “covered person” is defined in § 1041.2(a)(9). However, that term is not used anywhere in the regulatory text or commentary of the Rule. The Bureau is thus removing that definition and reserving § 1041.2(a)(9). No substantive change is intended by this correction.

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<sup>75</sup> The Bureau is not delaying the compliance date for § 1041.11, as discussed above, because the 2017 Final Rule did not provide for an August 19, 2019 compliance date for that section; its operative date was January 16, 2018. However, as discussed below, the Bureau is revising certain dates that appear in the regulatory text of § 1041.11 to reflect the delayed compliance date for the Mandatory Underwriting Provisions.

<sup>76</sup> Under the Administrative Procedure Act, notice and opportunity for public comment are not required if the Bureau for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(B). The Bureau is finalizing corrections in §§ 1041.2(a)(9), 1041.3(e)(2), 1041.9(c)(3)(viii), and appendix A without notice and public comment because it finds for good cause that seeking public comment on them is unnecessary. The corrections are technical in nature and have no intended substantive effect. Therefore, these amendments are adopted in final form.



### *§ 1041.3 Scope of Coverage; Exclusions; Exemptions*

Section 1041.3 addresses the Rule’s scope of coverage, as well as certain exclusions and exemptions. Section 1041.3(e) provides a conditional exemption for alternative loans; § 1041.3(e)(2) addresses the borrowing history condition, which is one of several conditions and requirements a covered loan must satisfy to qualify as an alternative loan. Section 1041.3(e)(2) states that the lender must determine from its records that the loan would not result in the consumer being indebted on more than three outstanding loans made “under this section” from the lender with a period of 180 days. However, that section (§ 1041.3) includes exclusions and exemptions for a number of other types of loans that are not relevant to the conditional exemption for alternative loans. The commentary accompanying § 1041.3(e)(2) refers to paragraph (e) rather than the entirety of § 1041.3 when discussing the requirements of the conditional exemption. The Bureau is thus correcting “this section” to “this paragraph (e)(2)” in the regulatory text of § 1041.3(e)(2). No substantive change is intended by this correction.

### *Subpart C—Payments*

#### *§ 1041.9 Disclosure of Payment Transfer Attempts*

Section 1041.9 requires certain disclosures with respect to payment transfer attempts, with § 1041.9(c) addressing the timing, content, and electronic delivery requirements for the consumer rights notice that a lender must provide after it initiates two consecutive failed payment transfers as described in § 1041.8(b). Section 1041.9(c)(3) lists the information and statements that the notice must contain, and states that the language used must be substantially similar to the language set forth in Model Form A-5. Section 1041.9(c)(3)(viii) requires a statement that the Consumer Financial Protection Bureau created this notice, a statement that the CFPB is a Federal government agency, and the URL to [www.consumerfinance.gov/payday-rule](http://www.consumerfinance.gov/payday-rule).

Model Form A-5, however, lists the URL as [www.cfpb.gov/payday](http://www.cfpb.gov/payday). To avoid any potential confusion as to which URL should be used, the Bureau is revising the URL in the regulatory text of § 1041.9(c)(3)(viii) to match the URL used in Model Form A-5. No substantive change is intended by this correction.

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

As discussed below, the Bureau is adding new § 1041.15 to explicitly set forth the effective and compliance dates in the Rule itself. To reflect that change, the Bureau is adding “Dates” to the heading for subpart D of the Rule.

*§ 1041.10 Furnishing Information to Registered Information Systems*

Comment 10(b)-1 addresses provisional registration and registration of information systems while a loan is outstanding, and provides an example of when a lender is and is not required to furnish information to a provisionally-registered information system. That example used dates in the year 2020. The Bureau is revising the example to instead use dates in 2021, to avoid any potential confusion as to whether and when lenders are required to furnish such information given this final rule’s delay of the compliance date for that requirement.

*§ 1041.11 Registered Information Systems*

As discussed above, the 2017 Final Rule became effective on January 16, 2018, though most provisions had a compliance date of August 19, 2019. The Bureau is not delaying the compliance date for § 1041.11, which sets forth requirements regarding RISes, because the 2017 Final Rule did not provide for an August 19, 2019 compliance date for that section; it became fully effective as of January 16, 2018. However, the Bureau is revising the regulatory text and

headings in § 1041.11(c), (c)(1), (c)(2), (d), and (d)(1),<sup>77</sup> and related commentary, to replace August 19, 2019, where it appears, with the delayed compliance date of November 19, 2020, as those provisions address how registration of information systems is to occur before and after compliance with the Mandatory Underwriting Provisions of the Rule more generally is required.

*§ 1041.15 Effective and Compliance Dates*

The Bureau is adding new § 1041.15 to expressly state the effective and compliance dates for various aspects of the Rule. Section 1041.15(a) provides that the effective date of the Rule is January 16, 2018, as was stated in the **DATES** section of the 2017 Final Rule.<sup>78</sup> Section 1041.15(b) provides that the deadline to submit an application for preliminary approval for registration pursuant to § 1041.11(c)(1) was April 16, 2018; this was also stated in the **DATES** section of the 2017 Final Rule. Section 1041.15(c) and (d) list the sections that remain with an August 19, 2019 compliance date and those that are delayed until November 19, 2020 by this final rule; together, these paragraphs address all the sections that were listed in the **DATES** section of the 2017 Final Rule with an August 19, 2019 compliance date. Specifically, § 1041.15(c) provides that the compliance date for §§ 1041.2, 1041.3, 1041.7 through 1041.9, 1041.12(a), (b) introductory text, (b)(4), (b)(5), and 1041.13 is August 19, 2019. Section

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<sup>77</sup> Section 1041.11(c)(1) allows the Bureau to preliminarily approve an entity as an information system before the compliance date. Section 1041.11(c)(2) allows the Bureau to approve the application from a preliminarily approved entity to become an RIS prior to the compliance date.

The Bureau is not, however, changing the April 16, 2018 date in § 1041.11(c)(3), which was the deadline to submit an application for preliminary approval for registration. As noted above, § 1041.11(c)(3)(iii) permits the Bureau to waive the application deadline on a case-by-case basis, and therefore the Bureau does not need to modify the existing April 16, 2018 preliminary approval date.

Section 1041.11(d)(1) sets forth the Bureau's process for approving and registering entities as information systems on or after the compliance date.

<sup>78</sup> 82 FR 54472.

1041.15(d) provides that the compliance date for §§ 1041.4 through 1041.6, 1041.10, and 1041.12(b)(1) through (3) is November 19, 2020.

*Appendix A to Part 1041—Model Forms*

The 2017 Final Rule was published, and added to the Code of Federal Regulations, without text headings for the model forms and clauses contained in appendix A. The Bureau is adding these headings now, using the text that appears in the images of the forms and clauses themselves. No substantive change is intended by this correction.

## **VI. Effective and Compliance Dates**

For the reasons set forth herein, the Bureau believes it is appropriate to delay the August 19, 2019 compliance date for the Mandatory Underwriting Provisions of the 2017 Final Rule—specifically, §§ 1041.4 through 1041.6, 1041.10, and 1041.12(b)(1) through (3)—to November 19, 2020.<sup>79</sup> This final rule adopting the compliance date delay, along with several clarifying corrections to the Rule, will become effective 60 days after publication in the **Federal Register**, prior to the previous August 19, 2019 compliance date for the Mandatory Underwriting Provisions of the Rule, and consistent with section 553(d) of the Administrative Procedure Act<sup>80</sup> and with section 801(a)(3) of the Congressional Review Act.<sup>81</sup>

In the Delay NPRM, the Bureau stated that after considering comments received on that proposal, the Bureau intended to publish a final rule with respect to the delayed compliance date for the Mandatory Underwriting Provisions of the 2017 Final Rule, if warranted. The Bureau also stated that any final rule to delay the Rule's compliance date for the Mandatory Underwriting Provisions would be published and become effective prior to August 19, 2019.

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<sup>79</sup> As discussed above, the Bureau is not changing the operative date of January 16, 2018 for § 1041.11.

<sup>80</sup> 5 U.S.C. 553(d).

<sup>81</sup> 5 U.S.C. 801(a)(3).

In response to the Bureau's request for comments on this aspect of the Delay NPRM, one commenter agreed that the final rule to delay the compliance date should be published and become effective prior to August 19, 2019, in order to provide clarity to industry, markets, and consumers and to avoid the possibility of piecemeal enforcement or the inference that the Bureau has determined not to enforce an existing rule. The commenter also stated that it would provide certainty beyond the pending litigation's current compliance date stay.

Another commenter stated that the Bureau should not assume that it can finalize a rule in time for it to be published and effective prior to August 19, 2019. The commenter argued that the Bureau's review of and response to comments should encompass the comments received on the Reconsideration NPRM because the Delay NPRM's impact analysis rests on the similar analysis in the Reconsideration NPRM. The commenter repeated an argument, addressed elsewhere in the preamble to this final rule, that the fact that the Reconsideration NPRM is pending does not justify a delay, but asserted that if the Bureau seeks to rely on that proposal it should address commenters' concerns about it.

The Bureau believes it was not incorrect to assume that it would be able to finalize and publish a compliance date delay final rule in time for it to be effective prior to August 19, 2019, as evidenced by the fact that it is doing so via this notice. The Bureau was aware that it would not be able to finalize the Reconsideration NPRM itself by that date, however, which is why it proposed the delay and reconsideration concurrently in separate notices. As explained above, as well as in the Delay NPRM, the purpose of this compliance date delay is to permit an orderly conclusion to the Bureau's separate rulemaking process to reconsider the Mandatory Underwriting Provisions of the 2017 Final Rule.

## **VII. Dodd-Frank Act Section 1022(b)(2) Analysis**

### *A. Overview*

As discussed above, this final rule delays the August 19, 2019 compliance date for the Mandatory Underwriting Provisions of the 2017 Final Rule to November 19, 2020. In the Reconsideration NPRM, the Bureau considered the impacts of rescinding the Mandatory Underwriting Provisions of the 2017 Final Rule. The analysis of the benefits and costs to consumers and covered persons required by section 1022(b)(2)(A) of the Dodd-Frank Act (also referred to as the “section 1022(b)(2) analysis”) in part VIII of the Reconsideration NPRM outlines the one-time and ongoing benefits and costs of rescinding the 2017 Final Rule’s Mandatory Underwriting Provisions.<sup>82</sup> As this delay of the August 19, 2019 compliance date constitutes a 15-month delay of the 2017 Final Rule’s compliance date for the Mandatory Underwriting Provisions, its impacts are effectively 1.25 years of the annualized, ongoing impacts described in the Reconsideration NPRM.<sup>83</sup> The impacts on the one-time costs described in the 2017 Final Rule primarily include a delay before covered entities must bear these costs, until no later than the new compliance date. As some covered entities may have already started to incur some of these one-time costs and others may incur the costs in advance of the delayed compliance date, the Bureau believes the monetary impact of a delay of the Mandatory Underwriting Provisions will have minimal impacts on the eventual costs incurred by lenders if the Bureau decides to retain the Mandatory Underwriting Provisions.

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<sup>82</sup> 84 FR 4252, 4281-95.

<sup>83</sup> See 84 FR 4298, 4302.

In developing this rule, the Bureau has considered the potential benefits, costs, and impacts as required by section 1022(b)(2)(A) of the Dodd-Frank Act.<sup>84</sup> 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 the Delay NPRM, the Bureau set forth a preliminary analysis of these effects and requested comments that could inform the Bureau's analysis of the benefits, costs, and impacts of the proposal. The Bureau specifically requested comment on the Delay NPRM's section 1022(b)(2) analysis as well as submission of additional information that could inform the Bureau's consideration of the potential benefits, costs, and impacts of this rule to delay the August 19, 2019 compliance date of the Mandatory Underwriting Provisions of the 2017 Final Rule. In response, the Bureau received a number of comments on the topic. 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. Description of the Baseline*

In considering the potential benefits, costs, and impacts of this rule the Bureau takes the 2017 Final Rule as the baseline, and considers economic attributes of the relevant markets as they are projected to exist under the 2017 Final Rule with its original August 19, 2019 compliance date and the existing legal and regulatory structures (*i.e.*, those that have been

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<sup>84</sup> 12 U.S.C. 5512(b)(2)(A).

adopted or enacted, even if compliance is not currently required) applicable to providers.<sup>85</sup> This is the same baseline used in the Reconsideration NPRM. See part VIII.A.4 of the Reconsideration NPRM for a more complete description of the baseline.<sup>86</sup>

## 2. *Appropriateness of Federal Regulation*

The appropriateness of regulation in this case—*i.e.*, for a delay of the compliance date—is discussed in more detail above. In summary, first, the Bureau’s Reconsideration NPRM, published on February 14, 2019 in the **Federal Register**, set forth the Bureau’s reasons for preliminarily concluding that the Mandatory Underwriting Provisions of the 2017 Final Rule should be rescinded. The Bureau is concerned that if the August 19, 2019 compliance date for the Mandatory Underwriting Provisions is not delayed, firms will expend significant resources and incur significant costs to comply with portions of the 2017 Final Rule that ultimately may be—and which the Bureau has proposed should be—rescinded.<sup>87</sup> The Bureau is likewise concerned that once the August 19, 2019 compliance date has passed, firms could experience substantial revenue disruptions that could impact their ability to stay in business while the Bureau is deciding whether to issue a final rule rescinding the Mandatory Underwriting Provisions of the 2017 Final Rule. The Bureau notes above that some of these impacts, notably, the exit of smaller market participants, may be irreversible. A consumer advocacy group commented that the Bureau should not rescind an existing rule based on lack of evidence to justify that rule, without first making an attempt to collect said evidence. The Bureau notes that

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<sup>85</sup> In addition to the compliance date delay, the Bureau is making certain clerical and non-substantive corrections to correct several errors it has identified in the 2017 Final Rule in §§ 1041.2(a)(9), 1041.3(e)(2), 1041.9(c)(3)(viii), and appendix A. No substantive change is intended by the corrections herein; since these corrections will have no impact on providers or consumers, they are not discussed further in this section 1022(b)(2) analysis.

<sup>86</sup> 84 FR 4252, 4282-84.

<sup>87</sup> See 84 FR 4298, 4299, 4303.



the Reconsideration NPRM sets forth both factual and legal grounds for reconsideration, both with respect to the unfairness determination and the abusiveness determination, and thus does not rely solely on the absence of evidence. Furthermore, the Bureau also notes that ongoing market monitoring is part of the Bureau's activities, but that to postpone finalizing this compliance date delay in order to collect additional evidence, and in so doing allowing compliance with the 2017 Final Rule's Mandatory Underwriting Provisions to become mandatory, would cause substantial revenue and market disruptions.

#### *B. Potential Benefits and Costs to Covered Persons and Consumers*

The annualized quantifiable benefits and costs of rescinding the Mandatory Underwriting Provisions of the 2017 Final Rule are detailed in the section 1022(b)(2) analysis in part VIII.B through D of the Reconsideration NPRM. Under this rule to delay the August 19, 2019 compliance date for the Mandatory Underwriting Provisions, these annualized benefits and costs will be realized for a period of 15 months (1.25 years). Additional, unquantified benefits and costs are also described in the Reconsideration NPRM's section 1022(b)(2) analysis. Under this rule, these costs and benefits will be realized for 15 months (1.25 years).

##### *1. Benefits to Covered Persons and Consumers*

This rule to delay the August 19, 2019 compliance date for the Mandatory Underwriting Provisions will delay by 15 months the implementation of the underwriting provisions and thus any restrictions on consumers' ability to choose to take out covered loans (including payday and vehicle title loans) that would be prohibited in the baseline. Several commenters, including trade associations and lenders, agreed with this characterization of maintained access, argued that choice in the market is a benefit for consumers, claimed that available alternatives are worse for consumers, and characterized those alternatives as more expensive or less regulated. A trade

association further asserted it would be more costly for consumers to default on more traditional credit products. Many consumer advocacy and public interest groups, meanwhile, argued this was not a benefit to consumers of the delay as access would be maintained for most consumers under the 2017 Final Rule, alternative products are already offered by banks and credit unions, and several small-dollar lenders have begun to offer (or have discussed offering) alternative products that would not be covered by the Mandatory Underwriting Provisions of the 2017 Final Rule (*e.g.*, non-covered installment loans).

The Bureau notes that it discussed these payday loan alternatives and their relative costs in the 2017 Final Rule, and has taken them into account in reaching its findings here.<sup>88</sup>

Several consumer advocacy groups also commented that extended loan sequences should not be considered credit access as they do not represent new credit, but the extension of existing loans, and asserted that the Bureau did not acknowledge this in the proposal. The Bureau disagrees that it fails to account for this; the analysis here, as well as in the Reconsideration NPRM and in the 2017 Final Rule, focuses on sequence lengths that treat reborrowing as part of a dynamic decision.<sup>89</sup> The Bureau agrees that most consumers would maintain access to payday loans in the absence of the delay; however, as outlined in the 2017 Final Rule, the Bureau's simulations suggest that 5.9 to 6.2 percent of borrowers would be unable to initiate a loan sequence they would choose without the delay.<sup>90</sup> Additionally, the Bureau noted that a larger share of vehicle title borrowers would be unable to initiate a loan under the 2017 Final Rule relative to payday borrowers, and that some of these consumers would be unable to obtain a

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<sup>88</sup> 82 FR 54472, 54842-46.

<sup>89</sup> The Rule defines a loan as being part of a sequence if it is taken out within 30 days of a prior loan being paid off. 12 CFR 1041.2(a)(14).

<sup>90</sup> 82 FR 54472, 54839.

payday loan as a substitute.<sup>91</sup> A few consumer advocacy groups also argued that the Bureau contradicted itself by finding that the 2017 Final Rule would result in reduced access but still concluding that the rule would be a net benefit for consumers, while it now treats access as a benefit to consumers. Access to credit itself is treated as a benefit in both the 2017 Final Rule and here, and the Bureau discusses the resulting costs from prolonged use of this credit separately in the section that follows.<sup>92</sup>

This rule will also delay the decrease in the revenues of payday lenders anticipated in the 2017 Final Rule (62 to 68 percent) by 15 months, resulting in an estimated increase in revenues of between \$4.25 billion and \$4.5 billion (based on the annual rate of \$3.4 billion and \$3.6 billion) relative to the baseline. A similar delay in the reduction in the revenues of vehicle title lenders will result in an estimated increase in revenues relative to the baseline of between \$4.9 billion and \$5.1 billion (based on the annual rate of \$3.9 billion to \$4.1 billion).<sup>93</sup> The rule will also cause a small but potentially quantifiable delay in the additional transportation costs borrowers would incur to get to lenders after the storefront closures expected in response to the 2017 Final Rule.

The Bureau notes that these estimates are based on simulations that assume at least one RIS will exist in the market, allowing payday lenders to issue loans under the principal step-down approach.<sup>94</sup> The Bureau still believes this is the most likely case in the steady-state equilibrium. However, in the case where there would not be an RIS in place at the 2017 Final Rule's compliance date, and the principal step-down approach would not be available on the

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<sup>91</sup> *Id.* at 54840.

<sup>92</sup> *Id.* at 54817-18, 54839-43.

<sup>93</sup> These values are not discounted, as they would begin being realized immediately, and annualized discounting over such a small horizon would have a minimal impact.

<sup>94</sup> 82 FR 54472, 54826.

compliance date, then the estimated decrease in payday loans and revenues under the Mandatory Underwriting Provisions would be more severe. For example, the 2017 Final Rule estimates a decrease in payday loan volumes of 92 to 93 percent in a regime where all loans are subject to the prescribed ability-to-repay underwriting of § 1041.5.<sup>95</sup> If no RIS will exist on the 2017 Final Rule’s compliance date this rule will at least delay—and to the extent it allows at least one RIS to enter the market, avoid—substantially larger decreases in revenues for payday lenders, while preserving substantially greater access to this type of credit for consumers.<sup>96</sup>

Multiple consumer advocacy groups commented that benefits to payday lenders are overstated because the Bureau’s cost estimates from the 2017 Final Rule did not account for lenders making changes to the terms of their loans to better fit the regulatory structure, or offering other products. The Bureau notes that this would fall under “changes to the profitability and industry structure that would have occurred in response to the 2017 Final Rule” discussed in part VII.B.3 below. One payday lender commented that the benefits of delay to payday lenders are understated, because the estimates from the 2017 Final Rule did not account for business closures resulting in complete revenue loss. The Bureau disagrees because the estimated revenue reductions cited are for the industry as a whole and the Bureau noted in the 2017 Final Rule that some lenders would likely exit as a result of decreased revenues.<sup>97</sup> Additionally, the Bureau’s estimates are consistent with two industry comments citing three separate studies, as discussed in

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<sup>95</sup> *Id.* at 54826.

<sup>96</sup> It is also possible that this increased access would be on average more beneficial to consumers, compared to the access this rule would preserve if the principal step-down approach would be available on the compliance date. This is because the evidence suggests short-term use of loans, and or loans taken in response to discrete needs may be welfare enhancing for consumers on average. The principal step-down approach largely ensured access to such loans in the 2017 Final Rule. However, this rule would better ensure access to such loans if the principal step-down approach were somehow infeasible.

<sup>97</sup> Further, the cited revenue decreases were for the simulation with no step-down approach loans. The Bureau estimated that with step-down approach loans included the effect of the 2017 Final Rule would most likely result in revenue decreases of 37 to 48 percent.

the 2017 Final Rule.<sup>98</sup> Similarly, a trade association claimed the revenue reduction would be higher than estimated in the 2017 Final Rule because the analysis did not account for consumers with the ability to repay being unable to demonstrate their ability under the mandated requirements, but the trade association did not cite any evidence or give further detail explaining this assertion. In the 2017 Final Rule, the Bureau allowed for reasonable steps to establish the ability to repay (including using estimates and lenders' prior experience with other customers) while also noting that the estimated share of borrowers who would qualify under the ability-to-repay provisions was "necessarily imprecise" given the available data.<sup>99</sup> At the same time, the Bureau notes its estimates were in line with estimates using information provided by industry in comments to the 2016 Proposal.<sup>100</sup> If the commenters were correct in asserting that the Bureau's estimates of these impacts are low, that would strengthen the Bureau's reasoning for postponing the compliance date. However, the Bureau does not believe this is the case, and is not relying on the assertions in those comments for its determination.

## *2. Costs to Covered Persons and Consumers*

The Reconsideration NPRM's section 1022(b)(2) analysis also discusses the ongoing costs facing consumers that result from extended payday loan sequences at part VIII.B through D. The available evidence suggests that, relative to the baseline in which compliance became mandatory, the Rule would impose potential costs on consumers by increasing the risks of: experiencing costs associated with extended unanticipated sequences of payday loans and single-payment vehicle title loans, experiencing the costs (pecuniary and non-pecuniary) of delinquency and default on these loans, defaulting on other major financial obligations, and/or being unable to

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<sup>98</sup> 82 FR 54472, 54826-27.

<sup>99</sup> *Id.* at 54824-25.

<sup>100</sup> *Id.* at 54831-33.

cover basic living expenses in order to pay off covered short-term and longer-term balloon-payment loans.<sup>101</sup> Relative to the baseline where the 2017 Final Rule's compliance date is unaltered, these costs will be maintained for 15 additional months under this rule.

Several consumer advocacy groups commented that certain of these costs would continue for more than 15 months and the effects may be long-lasting for some consumers. The Bureau recognizes that some costs resulting from loan sequences begun during the 15-month delay may occur after November 19, 2020. The Bureau notes these costs are already included, and accounted for, in the baseline. Specifically, there would have been similar costs associated with loans originated prior to the 2017 Final Rule's compliance date that extended beyond that date, and that rule's section 1022(b)(2) analysis accounted for these extended costs. These same extended costs will result after this rule's delayed compliance date, and are thus accounted for in the baseline, and do not represent an additional impact on the market by this delay final rule. The Bureau also notes that there are costs resulting from loan sequences that began prior to the 15-month delay that occur during the 15-month period of time, and that these costs are included in this estimate. This is consistent with the approach used throughout this section 1022(b)(2) analysis, which symmetrically assesses the costs and benefits resulting directly from the 15-month delay only (and does not account for costs and benefits already present in the baseline). A number of consumer advocacy groups argued the revenue that lenders would receive under the delay would come from fees paid by consumers and would simply represent a transfer from consumers to lenders and should, therefore, be treated as a cost to consumers. As in the section 1022(b)(2) analysis of the 2017 Final Rule, the Bureau does not double-count such transfers;

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<sup>101</sup> As mentioned in the Reconsideration NPRM's section 1022(b)(2) analysis, the effects associated with longer-term balloon-payment loans are likely to be small relative to the effects associated with short-term payday and vehicle title loans. This is because longer-term balloon-payment loans are uncommon in the baseline against which costs are measured. 84 FR 4252, 4290 n.351.

lenders will receive additional revenue as a result of the delay and consumers will pay additional fees in exchange for the use of payday loans. A trade association commented that the Bureau's estimated costs to consumers are too high because the Bureau never established that consumers are harmed by extended loan sequences, did not consider the benefits of these loan sequences for consumers, and ignored the set of alternatives consumers would have in the absence of payday loans. They further argued that consumers use these loans strategically and cite the Mann Study as evidence that borrowers know what they are getting into with an extended loan sequence.<sup>102</sup> The Bureau notes that in the context of the 2017 Final Rule it discussed the benefits to consumers from extended loan sequences and commenters provided no new or additional evidence of such benefits.<sup>103</sup>

### *3. Other Benefits and Costs*

Other benefits and costs that the Bureau did not quantify are discussed in the Reconsideration NPRM's section 1022(b)(2) analysis in part VIII.E. These include (but are not limited to): the consumer welfare impacts associated with increased access to vehicle title loans; intrinsic utility ("warm glow") from access to loans that are not used (and that would not be 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; changes to the profitability and industry structure that would have occurred in response to the 2017 Final Rule (*e.g.*, industry consolidation that may create scale efficiencies, movement to installment product offerings); concerns about regulatory uncertainty and/or inconsistent regulatory regimes across markets; benefits or costs to outside

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<sup>102</sup> See Ronald Mann, *Assessing the Optimism of Payday Loan Borrowers*, 21 *Supreme Court Econ. Rev.* 105, at 123 (2013).

<sup>103</sup> 82 FR 54472, 54841-42.

parties associated with the change in access to payday loans; indirect costs arising from increased repossessions of vehicles in response to non-payment of vehicle title loans; non-pecuniary costs associated with financial stress that may be alleviated or exacerbated by increased access to/use of payday loans; and any impacts of fraud perpetrated on lenders and opacity as to borrower behavior and history 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.). Each of these potential impacts is discussed in the section 1022(b)(2) analysis for the 2017 Final Rule and the section 1022(b)(2) analysis of the Reconsideration NPRM. To the extent that these impacts actually exist, they would continue under this rule for the 15-month delay of the compliance date for the 2017 Final Rule's Mandatory Underwriting Provisions.

A consumer advocacy group claimed the Bureau offered vague, "unquantified effects" in the Delay NPRM with little information on the importance of these effects in considering the impact. To the extent that data are available, the Bureau attempted to quantify these effects but notes that there is limited research on most of these effects other than what it discussed in the 2017 Final Rule. An independent research and advocacy group argued the delay will reduce the effect of regulatory uncertainty (*e.g.*, by reducing investment) because many lenders will not implement changes to comply with the 2017 Final Rule given that it may be changed. While the Bureau agrees this delay will have some impact on regulatory uncertainty, it does not have evidence of what the effects will be, especially given the pending status of the Reconsideration NPRM, which may ultimately decrease, increase, or have no effect on the compliance costs lenders will face. A trade association claimed the Bureau failed to consider the cost to consumer privacy. The Bureau notes that any risks to consumer privacy are delayed but otherwise are



unaffected by this delay final rule. The Bureau also notes that it did discuss privacy concerns relating to consumers providing lenders with additional financial information to comply with the 2017 Final Rule (though the Bureau knows of no available data that can be used to directly estimate the cost to consumers of providing this information). Multiple consumer advocacy groups argued the estimated costs of the delay are higher since the Bureau ignored the cost of increased auto repossession under the delay. The Bureau notes that vehicle repossession was explicitly considered in the potential costs to consumers of the delay above and in the section 1022(b)(2) analysis of the 2017 Final Rule.<sup>104</sup> Some commenters asserted that the Bureau failed to consider emotional or psychological harms to consumers due to the delay of the rule. While consumers might face such non-pecuniary harms from this rule, most of these harms have not been causally linked to the use of payday or title loans, let alone ones issued without ability-to-repay-based underwriting, so there does not appear to be compelling evidence that the delay of the rule will cause such harms.

The Bureau does not believe the one-time benefits and costs described in the Reconsideration NPRM will be substantially affected by this rule to delay the August 19, 2019 compliance date for the Mandatory Underwriting Provisions. In effect, this rule will provide institutions greater flexibility in when and how to deal with the burdens of the 2017 Final Rule's Mandatory Underwriting Provisions if the Bureau retains those provisions in the reconsideration rulemaking. Some firms may have already undertaken some of the compliance costs, meaning this rule delaying the compliance date will not allow lenders to recoup these sunk costs. With the delayed compliance date for the Mandatory Underwriting Provisions, others may use the additional time to install the necessary systems and processes to comply with the 2017 Final

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<sup>104</sup> 82 FR 54472, 54839.

Rule in a more efficient manner. Quantifying the value of this more flexible timeline is impossible, as it depends on, among other things, each firm's idiosyncratic capacities and opportunity costs. However, it is likely that this flexibility will be of relatively greater benefit to smaller entities with more limited resources. A trade association offered its support for the Bureau's claim that the delay will primarily shift compliance costs for lenders and suggested that some lenders may further reduce their costs if they use the additional time to flexibly implement changes. An independent research and advocacy group likewise supported the delay to reduce compliance costs, but further argued that these costs would be passed on to consumers. As the Bureau discussed in the 2017 Final Rule, standard economic theory does predict such costs would be shared with or passed on to consumers; however, "many covered loans are being made at prices equal to caps that are set by State law or State regulation" so lenders would have been unable to pass on such costs in a number of States.<sup>105</sup> As a result, while this rule will delay when lenders incur these compliance costs, it should not cause prices already at State caps to fall below those caps as those caps were unchanged by the 2017 Final Rule.

The Bureau expects, however, that with the delayed compliance date for the Mandatory Underwriting Provisions, most firms will simply delay incurring some or all of the costs of coming into compliance. The delay of 15 months will effectively reduce the one-time benefits and costs by 1.25 years of their discount rate.<sup>106</sup> While these firms will experience potentially quantifiable benefits, the Bureau cannot know what proportion of the firms will adopt any of the strategies described above, let alone the discounting values or strategies unique to each firm. For

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<sup>105</sup> 82 FR 54472, 54834-35.

<sup>106</sup> Over and above this inflationary discounting, it is also possible that the finalized delay will result in a decrease in the nominal technology costs associated with compliance, as technology costs are generally declining. However, given the relatively short horizon and relatively mature technology required for compliance (*e.g.*, electronic storage, database management software, etc.), this decrease in nominal costs is expected to be minimal.

a 15-month delay, the discounting of the one-time benefits and costs is likely to be less than 3 percent of the value of those benefits and costs.<sup>107</sup> As such, the Bureau believes the one-time benefits and costs of this rule are minimal, relative to the other benefits and costs described above.

*C. 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 were minimally constrained by the 2017 Final Rule's Mandatory Underwriting Provisions. To the limited extent depository institutions and credit unions do make loans in this market, many of those loans are conditionally exempt from the 2017 Final Rule under § 1041.3(e) or (f) as alternative or accommodation loans. As such, this rule will likewise have minimal impact on these institutions.

The Reconsideration NPRM notes that it is possible that a revocation of the 2017 Final Rule's Mandatory Underwriting Provisions would allow depository institutions and credit unions with less than \$10 billion in assets to develop products that would not be viable under the 2017 Final Rule (subject to applicable Federal and State laws and under the supervision of their prudential regulators). Given that development of these products has been underway, and takes a significant amount of time, and that this rule's delay does not affect such products' longer-term viability, this rule will have minimal effect on these products and institutions.

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<sup>107</sup> The 3 percent value assumes a discounting of 2.38 percent (the Effective Federal Funds rate as of June 4, 2019) for 1.25 years. This implicitly assumes all firms would undertake the necessary actions immediately in the absence of this rule, and would delay those actions for the full 15 months once the rule is adopted. The true value will likely be substantially less than this, as many firms will not delay by the full duration, and/or have already undertaken the actions that will result in the benefits or costs.

#### *D. Potential Impact on Consumers in Rural Areas*

The Bureau concludes that delaying the compliance date will not reduce consumer access to consumer financial products and services, and it may increase all consumers' access by delaying the point at which covered firms implement changes to comply with the 2017 Final Rule's Mandatory Underwriting Provisions. Under the rule, consumers in rural areas will 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 in more detail in the Reconsideration NPRM's section 1022(b)(2) analysis, 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 lenders and storefront single-payment vehicle title loans. By delaying the August 19, 2019 compliance date for the Mandatory Underwriting Provisions, the Bureau similarly anticipates a substantial increase in those markets relative to the baseline for the duration of the delay. A trade association suggested the Bureau did not fully consider the impact for consumers in rural areas. The Bureau disagrees as it discussed differential impacts for rural consumers especially in regard to costs from changes in geographic availability of payday loans in the 2017 Final Rule and as referenced above.

#### **VIII. Regulatory Flexibility Act**

The Regulatory Flexibility Act<sup>108</sup> as amended by the Small Business Regulatory Enforcement Fairness Act of 1996<sup>109</sup> (RFA) requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units,

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<sup>108</sup> Public Law 96-354, 94 Stat. 1164 (1980).

<sup>109</sup> Public Law 104-21, section 241, 110 Stat. 847, 864-65 (1996).

and small not-for-profit organizations.<sup>110</sup> The RFA defines a “small business” as a business that meets the size standard developed by the Small Business Administration (SBA) pursuant to the Small Business Act.<sup>111</sup>

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 would not have a significant economic impact on a substantial number of small entities.<sup>112</sup> The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small entity representatives prior to proposing a rule for which an IRFA is required.<sup>113</sup>

The Bureau certified that the Delay NPRM would not have a significant economic impact on a substantial number of small entities and that therefore neither an IRFA nor a small business review panel was required.<sup>114</sup> Upon considering relevant comments, the Bureau concludes that this rule will not have a significant economic impact on a substantial number of small entities. Therefore, a FRFA is not required.<sup>115</sup>

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<sup>110</sup> 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).

<sup>111</sup> 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.*

<sup>112</sup> 5 U.S.C. 601 through 612.

<sup>113</sup> 5 U.S.C. 609.

<sup>114</sup> 84 FR 4298, 4305.

<sup>115</sup> *See* 5 U.S.C. 605(b).

In the Delay NPRM, the Bureau explained that the proposed compliance date delay would benefit small entities by providing additional flexibility with respect to the timing of the 2017 Final Rule's Mandatory Underwriting Provisions' implementation. In addition to generally providing increased flexibility, the delay in the compliance date would permit small entities to delay the commencement of any ongoing costs that result from complying with the Mandatory Underwriting Provisions of the 2017 Final Rule. The Bureau also explained that because small entities would retain the option of coming into compliance with the Mandatory Underwriting Provisions on the original August 19, 2019 compliance date, the proposed delay of the compliance date would not increase costs incurred by small entities relative to the baseline established by the 2017 Final Rule. Based on these considerations, the Bureau concluded that the Delay NPRM would not have a significant economic impact on any small entities.

A trade association commenter stated that it agreed with the Bureau that the proposed compliance date delay would not have a significant economic impact on small entities, but rather would significantly benefit them, reiterating the argument that the Mandatory Underwriting Provisions, if implemented, will have a devastating impact on the industry, particularly on smaller entities. The commenter also agreed that because small entities retain the option of coming into compliance with the Mandatory Underwriting Provisions on the original August 19, 2019 compliance date, a compliance date delay would not increase the costs incurred by small entities.

Other commenters criticized the Bureau's RFA certification on the grounds that various benefits to small entities from delay were described elsewhere in the Delay NPRM, and these commenters viewed such benefits as qualifying as a significant economic impact on a substantial number of small entities. Specifically, one commenter noted that the Bureau had explained

elsewhere in the Delay NPRM that some small lenders believe the Mandatory Underwriting Provisions will significantly reduce their lending revenue, causing some to exit the market, and that some smaller industry participants had indicated that they do not have the resources to comply with new State and Federal requirements at the same time.<sup>116</sup> Another commenter perceived the Delay NPRM’s RFA certification as asserting that the benefit to small entities was primarily a timing change, while earlier portions of the NPRM estimate that a delay would result in concrete revenue gains for lenders. This commenter also perceived the RFA certification as relying upon a prediction that small entities would voluntarily adopt the Mandatory Underwriting Provisions, which the commenter viewed as contradicted by the rest of the Delay NPRM.

The Bureau does not agree that the benefits to small entities of this rule are capable of qualifying as a “significant economic impact” on a substantial number of small entities such that an IRFA and FRFA are required under the RFA.<sup>117</sup> That specific phrase is used several times in the RFA, and under accepted principles of statutory interpretation there is a presumption that a specific phrase bears the same meaning throughout a statutory text. Other uses of the phrase make clear that it refers to adverse effects on small entities, not benefits. For example, an IRFA must discuss alternatives considered by the agency that “minimize any significant economic impact” on small entities, and a FRFA must discuss steps taken by the agency to “minimize the significant economic impact” on small entities.<sup>118</sup> Congress could not have intended through the RFA to minimize benefits to small entities, and accordingly the Bureau does not believe that the benefits of this rule qualify as a significant economic impact. Further reinforcing this

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<sup>116</sup> As discussed above, the Bureau is not finalizing the compliance date delay on the grounds of unanticipated potential obstacles to compliance.

<sup>117</sup> 5 U.S.C. 605(b).

<sup>118</sup> 5 U.S.C. 603(c), 604(a)(6). *See also* 5 U.S.C. 610(a) (Periodic review of rules); Public Law 96-354, section 2(a)(7), 94 Stat. 1164 (1980) (Congressional findings).

conclusion, the other required elements of an IRFA and FRFA generally focus on adverse effects on small entities, and none specifically focuses on benefits to small entities.<sup>119</sup> Thus, performing an IRFA or FRFA for a rule (such as this compliance date delay rule) that has only benefits to small entities and no adverse effects on them would serve little purpose.

*Clerical and non-substantive corrections.* In addition to the compliance date delay, the Bureau is making certain clerical and non-substantive corrections to correct several errors it has identified in the 2017 Final Rule in §§ 1041.2(a)(9), 1041.3(e)(2), 1041.9(c)(3)(viii), and appendix A. No substantive change is intended by the corrections herein, and so these corrections will have no impact on small entities.

*Certification.* Accordingly, the undersigned hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

## **IX. Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA),<sup>120</sup> 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 this information collection request. In addition, given the Bureau's proposals to delay and

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<sup>119</sup> See 5 U.S.C. 603, 604.

<sup>120</sup> 44 U.S.C. 3501 *et seq.*



reconsider the Mandatory Underwriting Provisions, pursuant to the requirements of the PRA and the applicable implementing regulations,<sup>121</sup> OMB requested that the Bureau make an additional submission relating to just the Payment Provisions of the Rule; as of June 5, 2019, an OMB Control Number has not been assigned for this request.<sup>122</sup>

The Bureau has determined that this final rule would not impose any new recordkeeping, reporting, or disclosure requirements on members of the public that would constitute collections of information requiring approval under the PRA.

A consumer advocacy group commenter stated that the Delay NPRM did not explain the statement (also included herein, above) that the Bureau considers the OMB Control Number assigned to the 2017 Final Rule to be “not yet active” because OMB has not approved the PRA request submitted with the Rule. The commenter noted that January 16, 2018 was the statutory deadline for OMB to decide on the PRA request associated with the 2017 Final Rule and asserted that the Director of OMB declined to make a decision about that PRA request, with no announcement about that decision, his reasoning, or its impact. The commenter also noted that OMB regulations allow agencies to proceed with PRA collections, based on inferred OMB approval, if OMB does not act upon the agency’s submission within 60 days of a final rule being published in the **Federal Register**.<sup>123</sup> The commenter suggested that the Bureau was using the lack of PRA approval and OMB’s inaction as an alternative justification for delaying the Mandatory Underwriting Provisions. The commenter noted that the lack of OMB approval under the PRA affects not only the Mandatory Underwriting Provisions but also the Payment

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<sup>121</sup> 44 U.S.C. 3504(h) and 5 CFR 1320.11.

<sup>122</sup> See [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201902-3170-002](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201902-3170-002).

<sup>123</sup> 5 CFR 1320.5(a)(2), 1320.12(e)(2).

Provisions, which have a compliance date of August 19, 2019. The commenter asserted that a clear explanation of the Bureau's approach with respect to these issues is needed.

The Bureau is not relying on the lack of OMB approval under the PRA as a justification for this delay final rule; it was not cited in the Delay NPRM as such, nor is it cited herein. The Bureau does not have control over OMB's timing for approval of pending Information Collection Requests or issuance of OMB Control Numbers.

## **X. Congressional Review Act**

Pursuant to the Congressional Review Act,<sup>124</sup> the Bureau will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States at least 60 days prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this rule as a "major rule" as defined by 5 U.S.C. 804(2).

### **List of Subjects in 12 CFR Part 1041**

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

### **Authority and Issuance**

For the reasons set forth above, the Bureau amends 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.

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<sup>124</sup> 5 U.S.C. 801 *et seq.*

## **Subpart A—General**

### **§ 1041.2 [Amended]**

2. Amend § 1041.2 by removing and reserving paragraph (a)(9).

### **§ 1041.3 [Amended]**

3. Amend § 1041.3 by removing “section” and adding in its place “paragraph (e)” in paragraph (e)(2).

## **Subpart C—Payments**

### **§ 1041.9 [Amended]**

4. Amend § 1041.9 by removing “*www.consumerfinance.gov/payday-rule*” and adding in its place “*www.cfpb.gov/payday*” in paragraph (c)(3)(viii).

5. Revise the heading for subpart D to read as follows:

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

### **§ 1041.11 [Amended]**

6. Amend § 1041.11 by removing “August 19, 2019” everywhere it appears and adding in its place “November 19, 2020” in paragraphs (c) and (d), including the headings.

7. Add § 1041.15 as follows:

### **§ 1041.15 Effective and compliance dates.**

(a) *Effective date.* The effective date of this part is January 16, 2018.

(b) *April 16, 2018 application deadline.* The deadline to submit an application for preliminary approval for registration pursuant to § 1041.11(c)(1) is April 16, 2018.

(c) *August 19, 2019 compliance date.* The compliance date for §§ 1041.2, 1041.3, 1041.7 through 1041.9, 1041.12(a), (b) introductory text, (b)(4), and (b)(5), and 1041.13 is August 19, 2019.

(d) *November 19, 2020 compliance date.* The compliance date for §§ 1041.4 through 1041.6, 1041.10, and 1041.12(b)(1) through (3) is November 19, 2020.

**APPENDIX A TO PART 1041—MODEL FORMS**

8. In appendix A to part 1041, add headings for Model Forms and Clauses A-1 through A-8 to read as follows:

A-1 MODEL FORM FOR FIRST § 1041.6 LOAN

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A-2 MODEL FORM FOR THIRD § 1041.6 LOAN

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A-3 MODEL FORM FOR FIRST PAYMENT WITHDRAWAL NOTICE UNDER § 1041.9(B)(2)

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A-4 MODEL FORM FOR UNUSUAL WITHDRAWAL NOTICE UNDER § 1041.9(B)(3)

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A-5 MODEL FORM FOR CONSUMER RIGHTS NOTICE UNDER § 1041.9(C)

\* \* \* \* \*

A-6 MODEL CLAUSE FOR FIRST PAYMENT WITHDRAWAL ELECTRONIC SHORT NOTICE UNDER § 1041.9(B)(4)

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A-7 MODEL CLAUSE FOR UNUSUAL WITHDRAWAL ELECTRONIC SHORT NOTICE UNDER § 1041.9(B)(4)(II)(B)

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A-8 MODEL CLAUSE FOR CONSUMER RIGHTS ELECTRONIC SHORT NOTICE UNDER § 1041.9(C)(4)

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9. In supplement I to part 1041:

a. Under *Section 1041.10—Furnishing Information to Registered Information Systems*, revise *10(b) Information Systems to Which Information Must Be Furnished*.

b. Under *Section 1041.11—Registered Information Systems*, revise the headings for subsections 11(c) and 11(d).

The revisions and addition read as follows:

**Supplement I to Part 1041—Official Interpretations**

\* \* \* \* \*

*Section 1041.10—Furnishing Information to Registered Information Systems*

\* \* \* \* \*

*10(b) Information Systems to Which Information Must Be Furnished*

1. *Provisional registration and registration of information system while loan is outstanding.* Pursuant to § 1041.10(b)(1), a lender is only required to furnish information about a covered loan to an information system that, at the time the loan is consummated, has been registered pursuant to § 1041.11(c)(2) for 180 days or more or has been provisionally registered pursuant to § 1041.11(d)(1) for 180 days or more or subsequently has become registered pursuant to § 1041.11(d)(2). For example, if an information system is provisionally registered on March 1, 2021, the obligation to furnish information to that system begins on August 28, 2021, 180 days from the date of provisional registration. A lender is not required to furnish

information about a loan consummated on August 27, 2021 to an information system that became provisionally registered on March 1, 2021.

2. *Preliminary approval.* Section 1041.10(b) requires that lenders furnish information to information systems that are provisionally registered pursuant to § 1041.11(d)(1) and information systems that are registered pursuant to § 1041.11(c)(2) or (d)(2). Lenders are not required to furnish information to entities that have received preliminary approval for registration pursuant to § 1041.11(c)(1) but are not registered pursuant to § 1041.11(c)(2).

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*Section 1041.11—Registered Information Systems*

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*11(c) Registration of Information Systems Prior to November 19, 2020*

\* \* \* \* \*

*11(d) Registration of Information Systems On or After November 19, 2020*

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**[THIS SIGNATURE PAGE PERTAINS TO THE FINAL RULE TITLED “PAYDAY,  
VEHICLE TITLE, AND CERTAIN HIGH-COST INSTALLMENT LOANS; DELAY OF  
COMPLIANCE DATE; CORRECTING AMENDMENTS”]**

Dated: June 5, 2019.



A handwritten signature in blue ink, reading "Kathleen L. Kraninger", is written over a horizontal line.

**Kathleen L. Kraninger,**

*Director, Bureau of Consumer Financial Protection.*