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PARTNERS
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October 6th, 2016

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1700 “G” St., NW
Washington, DC 20552

Docket No: CFPB-2016-0025

Dear Director Cordray:

Reinvestment Partners is a non-profit group with a mission to seek economic justice. We achieve this goal using an interdisciplinary approach working with “people, places, and policy”. We provide direct service to consumers, either to protect them from financial harm or to advance their standing. We are improving our neighborhood through community economic development. In our policy work, we support the needs of lower-income consumers and communities of color through systematic reforms to the financial system.

We believe that payday loans are a dangerous product that undermines the financial security of vulnerable consumers. Payday lenders harm consumers as a way of business. Payday loans are inherently deceptive, offering a short-term solution that all too often puts borrowers in a repeating cycle of debt. In fact, because of the high costs of customer acquisition and high default rates, payday lenders rely on putting a share of their customers into a debt trap in order to achieve a profit. Once a borrower takes out the first payday loan, it is all too likely that he or she will repeatedly refinance. Research shows that short-term loans are the exception, and in fact, the average borrower remains in debt for a period of between five and seven loans[1]. Even research sponsored by the payday loan industry reflect the odious nature of this product. A 2011 report by Non-Prime 101 found that one-quarter of payday loan users fell into a loan sequence of at least 11 loans over a multi-year period. Moreover, some lenders are overtly deceptive – the sales

[1] Marc Anthony Fusaro & Patricia J. Cirillo, Do Payday Loans Trap Consumers in a Cycle of Debt?, at 23 (2011),

manual used by one lender that trained staff on how to best put consumers in a repeating cycle of debt[2].

Our greatest priority is that the new rule is driven by the principle that borrowers should only receive a loan when they have the ability to repay it. Payday lending is unlike any other kind of lending because it is the only case in which lenders and borrowers do not share a common interest in the repayment of a loan. With payday, certain longer-term loans, and vehicle title lending, the opposite is true. When a borrower is unable to repay a payday loan, the lender can force the borrower to refinance and to thereby record additional fees. Most storefront and online lenders have high customer acquisition costs, and those costs can easily be equivalent to or even greater than the fee revenue from the first loan. All of this underscores why there is a compelling reason for intervention in this market.

We submit this comment to answer questions posed by the Bureau for the regulation of all payday loans.

In general, we think that while the ability-to-repay rules are strong with a few exceptions, the exemptions are so large as to make it all but certain that millions of Americans will still be given loans that they cannot afford. Consumers will be able to get six unaffordable loans – which is six too many.

However, we also express our concern that this rule will have the effect of allowing payday loans back into North Carolina. Payday and car title loans have been illegal in our state since 2001. At the time, there were thousands of storefront payday loan firms in our state. Even with a law in place, it took our regulators almost five years to remove every lender from within our borders. Thus, we are apprehensive that this rule will lay the legal groundwork for payday lenders to contend that their loans are "safe" and should accordingly be re-introduced in their framework to North Carolina. We want a strong rule. We also want a rule that will defer to stronger pre-existing state laws.

SUBPART A—GENERAL

1041.1 Authority and purpose.
1041.2 Definitions.
1041.3 Scope of coverage; exclusions.

1041.3 Scope of coverage; exclusions.
Because any discussion of a rule necessarily begins with how an ill-intentioned lender might evade coverage, we applaud the Bureau's efforts to write an exhaustive rule that seems to contemplate almost any method of evasion.

[2] ACE Cash Express

We support the Bureau's plan to define a short-term loan as one with a contractual duration of fewer than 45 days. While research shows that most single repayment loans are repaid or refinanced in less than 2 weeks, some lenders might redesign their products to be originated immediately prior to an upcoming payday and then due in a balloon sum at the end of the next pay period. Forty-five days allows the rule to cover those loans for workers who are paid on a monthly basis. Additionally, a period greater than 30 days would make it impossible for lenders to develop a special product for workers who were new to their jobs and were likely to have to wait more than four weeks for their first paycheck.

We believe that the Bureau has the authority to apply its scope of coverage to longer-term loans if they have interest rates above 36 percent. Although the interest rate does establish the boundary for supervision, this is not an example of rate-setting. The Bureau's rule allows lenders to establish any price they want but sets certain expectations for loans depending upon how the price is set. Longer-term loans with interest rates above 36 percent tend to be the ones that cause the most harm to consumers, underscoring why the CFPB should review them under their authority for the Federal Trade Commission Act (Section 5). Additionally, because a threshold of 36 percent matches many state usury caps (and the Military Lending Act) this choice will naturally make it easier for this rule to work in tandem with existing laws.

Loans originated via an employer relationship would seem to be particularly vulnerable to origination without underwriting. There are loan programs that are marketed to employers as an employee benefit, and it seems plausible that consumers might artificially lower their list of expenses if they had to report that information via their employer. Thus, there should be enhanced privacy safeguards built into situations where ability-to-repay ("ATR") information is collected through employers. It also seems possible that lenders could incent employers to offer those loans to their employees – similar to how universities and employers are already incented by payroll card issuers. Given that, there would be an enhanced chance of coercion.

We strongly urge the Bureau to include all loans that are secured by a car title within the scope of coverage, even if they bear interest rates below 36 percent (proposed § 1041.3(c)(3). To be clear, this would not include "first position" loans used for the purpose of purchase (as in proposed § 1041.3(e)), but only for loans used against titles held by borrowers. As well, this protection should be extended to loans secured by boats, motorcycles, or manufactured homes. In our research on one popular installment lender, we noted that it was very common for loans to be secured by boats. Those loans tended to bear rates that were only slightly below 36 percent, and indeed, if their APRs had included the cost of the multiple credit insurances written in tandem with the loan, the costs might have actually been greater than 36 percent.

We do not believe that coverage should be limited to loans where leveraged payment mechanisms are established and timed to debit an account in sync with a borrower's income. A high-cost single payment loan, even if scheduled to be repaid at some time after an income flow, is still a product that can be dangerous to consumers. (Proposed § 1041.3(b)(2)(ii)

SUBPART B—SHORT-TERM LOANS

1041.4 Identification of abusive and unfair practice.
1041.5 Ability-to-repay determination required.
1041.6 Additional limitations on lending—covered short-term loans.
1041.7 Conditional exemption for certain covered short-term loans.

1041.4 Identification of abusive and unfair practice.
In 2001, Reinvestment Partners co-authored "Too Much Month at the End of the Paycheck: Payday Lending in North Carolina" with the UNC Center for Community Capital[3]. We interviewed consumers who had taken out payday loans. In the appendix of this comment, we include some of the text from those interviews. We offer their statements as a contribution to the Bureau's request for evidence of "Market concerns – Short Term Lending" related to § 1041.4.

§ 1041.5 Ability to Repay Determination Required
Definition: Basic living expenses

Basic living expenses during durations of 45 days or less should incorporate a likely list of costs that can reasonably be expected for a particular consumer, given his or her transaction history. The Bureau's intention to pursue a principle-based definition of expenses is well-intentioned but not robust enough. It makes a number of assumptions that are problematic. First, it allows the lender to make a determination about the number of expense categories that should be included in the calculation. Secondly, it works under the belief that such costs can be assumed to be consistent across consumers. The Bureau asks for comment on the possibility that those costs could be factored for family size or geography, but even then expenses would be based on assumptions. We think that the rule would be more effective if underwriting was derived from a combination of account statements, transaction account records, and third-party information systems were utilized in combination with each other.

Definition: Major Financial Obligations

The scope of major financial obligations should include housing expenses, minimum payments on outstanding debts – both "covered" and "non-covered." Non-covered loans should include loans of all varieties: student loans, car loans, mortgage payments, and even pawn loans. We agree with the Bureau's intention to include alimony and child support. In addition, outstanding taxes should be included.

In our opinion, an ATR approach that subtracts basic living expenses from residual income is superior to a "rules-of-thumb approach" – for example, a maximum payment-to-income ratio –

[3] http://ccc.unc.edu/contentitems/too-much-month-at-the-end-of-the-paycheck-payday-lending-in-north-carolina/

to either presumptively or conclusively demonstrate compliance with the rule of thumb" approach. While it is true that this method could be simpler for lenders to use, it would put a share of approved borrowers into debt traps. The rule would not be sensitive to instances where borrowers' monthly expenses are greater than their monthly incomes. In other words, merely because the rule-of-thumb approach would correctly underwrite for some borrowers, it is a poor method because of would necessarily create many false positives.

The Bureau asks for comment on "whether a simple prohibition on making covered short-term loans without determining ability to repay, without specifying the elements of minimum baseline methodology, would provide adequate protection to the consumer and clarify to industry about would constitute compliance."

But in determining affordability, either for short-term or longer-term loans, we are most concerned with how basic living expenses are defined. Given that residual income, if defined as income minus major financial obligations, can generally be deduced from only a few financial statements that are fairly universal, that part is fairly simple. But basic living expenses are different for everyone. If the ATR standard is to be effective, it should be able to make a judgment that tracks real income and expense flows.

We urge the Bureau to adopt a standard that models affordability from as much borrower-specific evidence as is possible. (§ 1041.5(c)(3)(ii)

Verification of Basic Living Expense: Consumer statements are essential to the valid verification of basic living expenses. (c) (3) (ii)

The transaction account method sharpens verification of income and expense. Thus, in reviewing various models for ATR, we prefer the proposed comment. But transaction accounts should be supplemented by statements from billers whenever possible. Evidence of expenses paid in cash, such as for housing expense *(Proposed § 1041.5(c)(3)(ii)(D))* are probably best discovered through transaction accounts. But transaction accounts can sometimes be less than specific and could hide instances where applicants paid less than the full amount due. Given that, we hope that lenders could make use of biller statements as a complement to cash bills and always if possible with non-cash payments. In addition, court-ordered payments should be accounted for with statements – i.e. payments of child support *(Proposed § 1041.5(c)(3)(ii)(C)).*

In turn, we are also optimistic that a consumer account information system as defined by Proposed § 1041.5(a)(3) could record evidence of "major financial obligations." Such a system would have the virtue of capturing all reportable loan obligations across covered and non-covered loan types. (proposed § 1041.5(a)(1)))

We believe that the call for a "principle-based definition" of basic living expenses is poorly designed. We see that the Bureau is considering the use of child care expenses, but only in the context of its relationship to the ability to produce income. Child care can be an important element of enrichment. Many studies show that pre-k education is one of the key predictors of

educational outcomes. But beyond its merits as a tool for education, child care is but one example of an expense that is real for some but not for others.

To our point about how some expenses can be mandatory, but not applicable to everyone's budget, consider evidence from a Missouri diaper bank. In a formal research survey conducted by the diaper bank by a local university, it found that its very low-income clients were short about 10 diapers per week. Ten diapers cost about three dollars. Parents were picking a variety of suboptimal options: leave their child without a diaper, re-use a diaper, or use a substitute piece of cloth like a shirt or a towel. We are going to adopt the judgment that diapers are a necessity. But interestingly enough, the survey also asked about financial habits. The results found that one in five of their clients had taken out a payday loan in the last year[4].

Another problem with the use of principal-based expenses is that it is not really possible to assume that expenses will be consistent for all consumers. Expenses – even for the same expense category – are very heterogeneous. This supports our answer to the Bureau's invitation for comments on whether additional considerations could be included in the residual income test (Proposed comment 5(b)-4). The Bureau mentions family size, consumer location, and consumer income. To the latter, it seems appropriate to also consider the ebbs and flows of a consumer's cash flow. For consumers where monthly flows vary, the lender should be encouraged to estimate income at the low end of income variation.

The diaper bank's example speaks to the need (relevant to *§ 1041.5(b)-2.i*) to add flexibility to how basic living expenses are calculated. For recurring needs that are in addition to ones that are somewhat universal (principal-based), it still makes sense to fold them into an ability-to-repay formula. Because many of those costs will come not from businesses that invoice but instead from retailers that provide a receipt, it would be better to refer back to records from a checking or prepaid debit card account (a "transaction account"). Using transaction accounts as evidence (Proposed § 1041.5(c)(3)(i)) should improve the accuracy of an ATR calculation – and all from a single source.

Proposed comment 5(b)-2 puts the onus on lenders to include unusual costs in an ATR calculation when they become aware of such information. This may be an area of deception. Lenders may train their staff to ignore evidence. This is the kind of problem that could be avoided with the use of transaction account statements.

If the Bureau takes a different course and instead allows empirical evidence to rebut a challenge to an ATR determination (proposed comment 5(b)- 2.iii) then the Bureau should offer this as an option only if a very high rate of loan performance can be demonstrated. Thus, if the lender asserted that it was not given important information that would have otherwise made the loan unaffordable, the lender should not receive leniency.

[4] Interview with John Teasdale, Happy Bottoms. September 10th, 2016.

In Section 8, HUD calculates affordability in a system that is sensitive to some variations in income inputs. But because this is generally driven by homogenous expense inputs, it has flaws. It is not sensitive to variations in most expense inputs. The cost of heat is the same – no matter to what extent the heating system is more efficient, or to the extent that the renter is living in an area with a higher heating and cooling load.

The relevance of the HUD HCV income and expense test relates to the question of the sensibility in using an a priori standardized input for judging residual income. A question is if the calculation would set a fixed sum for transportation or food expense for all loan applications, or leave open the possibility that lenders would be asked to verify actual past expenses. The latter are likely to be more helpful in making a specific determination of ability to repay. For example, isn't it likely that heating expenses would differ among applicants living in Montana as opposed to Florida? Allowing lenders to put in the same input, when a third-party information system could make a more accurate analysis, is a mistake.

Additionally, the Bureau asks for comment (1041.5) on if it is appropriate to add to the ability-to-repay requirement to vet for income and expense by also examining for the ultimate performance of those loans. We think that this is very sensible. Certainly, it should be defensible. If it the case that exempted loans are actually performing differently that would otherwise be expected by a lender's particular underwriting, then the Bureau would be within its purview to make an inquiry and to subsequently revisit a lender's justification for its underwriting policy.

While a simple DTI approach is appealing for its simplicity, it has several shortcomings. For one, merely by measuring for income, the notion of affordability is determined without taking into account any part of expenses. As a result, it is insensitive to the question of the debt trap.

As Charles Dickens wrote, "Annual income twenty pounds, annual expenditure nineteen [pounds] nineteen [shillings] and six [pence], result happiness. Annual income twenty pounds, annual expenditure twenty pounds ought and six, result misery.[5]"

What Dickens meant to say, had he gotten his comment in on time, is that an exemption to the ability-to-repay requirement for loans with payments that do not exceed 5 percent of a borrower's income isn't appropriate. If that was the case, he would have just 'go ahead and borrow 1 shilling – no problem.' Dickens saw the question in terms of both income but also expense – and he didn't break out some expenses as relevant but others as not. To Dickens, misery and happiness turned on the entirety of a budget. Dickens went on, in fact, to talk about an appropriate length for a budget analysis. He framed the question in terms of a year – and not a single pay period. So again – Dickens knew back then – well before the comment period and

[5] Dickens, Charles. The Personal History, Adventures, Experience and Observation of David Copperfield the Younger of Blunderstone Rookery (Which He Never Meant to Publish on Any Account). Bradbury and Evans, published serially from May 1849 to November 1850.

even before the origin of the deferred deposit advance – that affordability could not be answered by just looking at income.

Empirically, a debt-to-income test (of 5 percent) would mean that the metric qualified a large number of lower-income households for a payday loan. The next table sorts annual household income of borrowers by annual interest rate, assuming a loan term of 189 days and a loan amount of $392. Those numbers are used as inputs because they match up with the average loan term and loan amount in Colorado in 2014, where the 5 percent rule was tested[6]. Note: these inputs represent the interest rate, term, and amount at the moment of underwriting.

Table: Affordability of Loans, Based upon a Maximum Debt-to-Income Ratio of 5 percent

income versus interest rate		75%	100%	125%	150%	175%	194%
annual household income	$10,000	not	not	not	not	not	not
	$15,000	not	not	not	not	not	not
	$20,000	affordable	not	not	not	not	not
	$25,000	affordable	affordable	affordable	affordable	affordable	not
	$30,000	affordable	affordable	affordable	affordable	affordable	affordable
	$35,000	affordable	affordable	affordable	affordable	affordable	affordable
	$40,000	affordable	affordable	affordable	affordable	affordable	affordable
	$45,000	affordable	affordable	affordable	affordable	affordable	affordable
	$50,000	affordable	affordable	affordable	affordable	affordable	affordable

This sets up a situation where a full-time worker earning $10.59 per hour ($22,042 per year) would be able to afford a $400 six-month installment loan with an interest rate of 120 percent. The availability of credit would be appropriate if loans performed well, but the evidence is to the contrary. According to the State of Colorado, 44 percent of the loans in the study group defaulted[7]. If those conditions were applied to a vehicle title loan, the impact would be even worse; scores of borrowers would lose their transportation through a product that had been granted legal approval.

1041.5 Long-Term Indebtedness on Short-Term Loans

We would like to push back on the CFPB's proposal that would use six loans as the threshold point for scrutiny under an ability-to-repay regime.

[6] Colo. Code Regs. § 902-1, Rule 17(B)1, available at http://www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=3842; Adm'r of the Colo. Unif. Consumer Credit Code

[7] Ibid.

We think a better solution would be to focus on the number of days in a given 12-month period that a borrower is indebted to a covered loan. The value of this approach is to reduce the opportunity for gamification of rules: if there is a numerical limit, then lenders will most likely respond by offering month-long loans with accordingly larger fees. If the rule defined long-term indebtedness solely based upon the number of loans, then a 6-loan cap could mean indebtedness of half the year. By definition, half of a year is far more of a debt trap than would be the case for one defined by a maximum of 84 days (six loans times 14 days).

To that point, research demonstrates that a cap defined merely as a ceiling of six loans would allow the rules to exempt as many as 2/3rds of all payday loan sequences and approximately 64 percent of car-title loan sequences[8].

In cases where the short-term loan is structured as a line of credit, the test of an ability to repay should not be that timing of residual income flows can exceed minimum payments, but that residual income over the period of the loan can cover the entire cost of paying off the line of credit. Thus we support the intention of the Bureau in Proposed § 1041.5(a)(5)(iii) to assume that the borrower will take out the maximum amount of credit from the line, and accordingly, to gauge the affordability of the loan on the assumption that he or she would need enough residual income to cover those debt payments. We also support the Bureau's intention (proposed § 1041.5(b)(1)) to require an additional ATR determination if more than 180 days have passed since the last ATR determination.

§ 1041.6 Additional Limitations on Lending—Covered Short-Term Loans

We support a presumption of unaffordability that tests for the ability to meet basic living expenses even after a loan has been paid back. In cases where a consumer has an outstanding covered loan or had one that was paid back in the prior 30 days, then a new loan is not affordable. Thus, a lender could not meet the ATR test if it appeared the expense flows during the period of the loan – and the 30 days thereafter – would create a deficit at any point in time. But a gap of only 30 days is not enough – the waiting period should be lengthened.

If lenders were able to avoid making an ATR calculation so long as it had been thirty days since the last loan, then it could easily be the case that a borrower remained in debt for up to one-half of the year. Assuming that the fee for a loan was 15 percent of the sum borrowed (storefront), then a borrower would pay $450 to borrow $500, and if the fee was 25 percent (online), then the fee for a $500 loan would be $750.

We agree that income volatility is a concern (proposed § 1041.5(b)(2)(i)). But we disagree with the proposal to let lenders estimate future income in cases where there is regular variation in consumer income. A reliable projection of future income should be conservative if the goal is to avoid debt traps; many workers with variable incomes (tipped workers, small business owners, part-time workers, cyclical professions) have at best an intuitive sense of likely income in the

[8] Market Concerns – Short-Term Loans

future. Unfortunately, lenders would be motivated to estimate future income more optimistically if it increased their chances of putting a lender in a loan.

A better approach for such workers would be to refer to transaction records over a longer time – such as during the past year. In discussing proposed 1041.5(c)(1), the Bureau comments that it would be necessary to prescribe a specific period for reviewing income, but for seasonal workers and those with high volatility, a specific standard has some merit. Since seasonality is very common – and payday loan applicants are likely to seek a loan at a point in the year when their cash flows are more limited – a full year of income would be very helpful. The best approach to guarantee affordability would be to base the residual income upon the lower range of incomes during the preceding 12 months.

We emphatically support the Bureau's concept in proposed § 1041.6 to establish mandatory cooling-off periods. This idea is central to eliminating the debt trap. That concern is underscored by CFPB research showing that most borrowers renew and few amortize from loan to loan[9].

1041.6 (e) Overcoming the presumption of unaffordability

If it is truly the case that a consumer's economic standing has changed to the point that he or she can now afford a loan, then it must be expected that the consumer would have already paid off their previous loan. If they have not, then the lender should not be able to contend a new loan – even if a borrower's income level has changed for the better.

As a result, in cases where a presumption of affordability is based upon an improvement in borrower income, it is important to establish a minimum waiting period between pay off of a previous loan and any opportunity to receive a new loan. While the Bureau has proposed a 30-day cooling off period (proposed § 1041.6(f)), we argue for a 60-day definition. An improvement in finances does not occur overnight, even if income does. Most people need time to catch up. Our sense is that the same standard as appropriate for cooling off for borrowers with constant income as for borrowers with improved incomes. There is also a factor of uncertainty. If the source of additional income is a new part-time job, then there is the possibility that the number of hours expected may turn out to be less than a borrower had predicted and not consistent from the first month to the second month.

In response to the Bureau's request for input on alternative approaches to address the issue of repeat borrowing in cases where income or expenses have changed, and specifically if number of loans or time in debt is a better trigger for a cooling off period, we offer our preference for the "number of loans" approach. The arrival of additional income (or reduced expense because of a prior unexpected one-time cost event) should not reset the 3 loans in one sequence rule. As well, we contend that a borrower whose financial position has improved should still not be able to

[9] http://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf

qualify for another loan if he or she would then be in debt for more than 90 days in a 12-month period.

But in addition, we recognize the need for caution in defining when an expense is unexpected and thus worthy of overcoming a presumption of unaffordability. The Bureau quotes the industry's example of a car expense. But while a car expense impacts cash flow, car maintenance is really an accruing transportation expense, and even when there is no cash outflow in a period for car maintenance, a realistic budget sets aside for maintenance on an ongoing basis. '

If a borrower has demonstrated the need to renew a loan two times after the initial term, then this experience demonstrates that the loan is not affordable. This underscores why it is important to stop new lending after 3 periods. As well, if the borrower seeks to make another loan after the cooling-off period, the new loan should still have to be vetted to meet the presumption of affordability test.

1041.7 Conditional Exemption for Certain Covered Short-Term and Long-Term Loans

Loans should not enable a borrower to fall into a debt trap. The idea of an exemption undermines that goal. We believe that Bureau should reverse course. Rather than creating a structure that allows for an exemption, the rule should apply a full ability-to-repay test for all loans.

The Bureau has proposed to grant exemptions for certain loans, provided they meet several tests: a loan amount below $500, subsequent loans with principal step-downs, complete amortization with no balloon payment, no security interest in a vehicle title, and not an open-ended line of credit. Additionally, the Bureau proposes to require lenders to verify that the borrower has no outstanding covered loan, and additionally, no record of too many loans in prior periods.

Significantly, for loans that meet these standards, there is no income or expense test. We believe that the opportunity to bypass the ATR requirement is a mistake.

It is also the case that an open-ended loan structure if granted an exemption from an ability-to-repay standard, would create a large window for the creation of debt trap-inducing products. We support the decision outlined in proposed § 1041.7(b)(4) that would deny an exemption for an open-ended loan. Without this exclusion, lenders could issue a high-cost credit line that might remain drawn upon serially, with little or no periods when it was fully paid off. In spite of the objections stated by some members of the Small Business Panel, we think that this requirement should be a part of the final rule.

Additionally, as an organization from a state that banned payday lending, we are worried that the exemption creates the regulatory space that will enable payday lenders to return to North Carolina.

Security interest in a Vehicle, under Section 7 § 1041.7(b)(3)

We oppose a situation where a lender, if origination a loan defined and privileged under Section 7, would be permitted to take a security interest in a vehicle. It is our opinion, respectfully

submitted, that under no circumstances should the Bureau establish any kind of leniency for a car title loan.

SUBPART C—LONGER-TERM LOANS

1041.8 Identification of abusive and unfair practice.
1041.9 Ability-to-repay determination required.
1041.10 Additional limitations on lending—covered longer-term loans.
1041.11 Conditional exemption for certain covered longer-term loans up to 6 months' duration.
1041.12 Conditional exemption for certain covered longer-term loans of up to 24 months' duration.

Proposed 1041.9 Ability-to-repay determination required

A review of transaction accounts also speaks to the question posed by the Bureau in § 1041.9(c), where it asks how an ATR calculation might change if a borrower's income or expenses changed over the course of a loan sequence.

We support proposed comment 9(c)(3)(ii)(D)-1.ii. Using a formula that calculates expenses based upon "similarly situated consumers" is unnecessarily simplistic. Expenditures for housing and transportation expense can vary greatly within the same geography. As well we know that many people receive non-cash subsidies for certain types of expenses.

To some extent, there is evidence that suggests that lower-income households often pay more for utilities, for example, because they select from substandard housing. Thus, a fixed estimate might for utilities might put some people at risk of the debt trap, if their actual expense was lower than the itemization sum. Proposed comment 9(c)(3)(ii)(D)-1.iii seems to support the use of Census data, with expense sensitive only to locality. This is akin to the HUD approach, and it is not ideal.

In searching for statistical evidence that would provide a useful means for estimating elements of a consumer's recurring expenses, Reinvestment Partners found research from the Federal Reserve's Survey of Consumer Finances. The SCF reviewed spending according to consumers in ten different income deciles.

Table: Consumer Spending, Itemized as a Percentage of Income, By Income Decile

Spend Category by Income Level Decile	Lowest	Second	Third	Fourth	Fifth	Sixth
Food	16.3	14.6	14.0	14.6	12.6	12.7
Education	4.3	1.4	1.8	1.1	1.2	1.5
Housing	39	41	38	35	36	34
Utilities, fuel, and public services	9.0	10.0	9.4	9.0	8.6	7.9
Transportation	15.3	13.9	16.6	17.2	19.1	19.3

Healthcare	6.4	9.3	9.9	9.6	8.8	8.5
Personal insurance and pensions	1.7	3.1	4.0	5.8	7.7	9.5
Necessities/Income	**92.3**	**93.7**	**93.8**	**92.6**	**93.5**	**92.9**

Source: Survey of Consumer Finances

The point of this table is to show that budgets of consumers in the lower deciles of income are already stretched thin. Research by the CFPB[10] and the Pew Center points at the lower deciles as the ones most relevant to establishing an itemized budget. According to Pew, approximately one of every two payday loan borrowers had an income below $25,000[11].

This table supports the idea that expenses should be a part of an ability-to-repay test – and accordingly, that only vetting for income could easily mean that lenders approve consumers who do not actually have an ability to repay their debt:

A list of this length is legitimate. Each of these items is truly a necessity – everyone must eat, be housed, have access to utilities and transportation. Given that many states require car insurance and that the Affordable Care Act penalizes tax filers who do not have health insurance, these are also legitimate expenses for all households. Schooling is elective, but it is also a known recurring expense. Child care should be included in education, and if so, it would further illustrate how educational expenses are recurring and necessary. Educational expenses should include student loan payments. Other expenses that should be considered as recurring or mandatory and thus part of a residual income test:

- Tax obligations – including back taxes owed.
- Child support *(as mentioned in Proposed § 1041.5(c)(3)(ii)(C))*
- Publicly-reported liens and unpaid judgments

In our review of bankruptcy filings, we also saw many instances where consumers listed payday loans and back taxes.

We think that this list is probably not exhaustive. Some consumers will have additional mandatory ongoing expenses, which relates to *proposed § 1041.5(a)(1)*. Still, in cases where a consumer can have an expectation that those expenses are going to be recurring, it should be possible for lenders to collect that information and add those expenses to their residual income worksheet.

We are concerned that the Bureau’s proposed methodology would not require lenders to follow a detailed analysis of “basic living expenses.” The Bureau is proposing a "principal-based approach" that aims to establish a finite set of commonly-used expenses, but not to rely on a model that is more tailored to the individual consumer experience. We believe that is method will be vulnerable to evasion by lenders. To that point, the Bureau’s proposed comment

[10] The Bureau reports that 46 percent of borrowers have household incomes of less than $30,000.
[11] Pew Charitable Trusts, Payday Lending in America: Who Borrows, Where They Borrow, and Why

9(b)(2)(i)-2 calls for lenders to identify a "cushion" where a consumer could survive a spike in expenses or a drop in income. We think this is an essential step to making the ability-to-repay clause a meaningful expectation. One option is that a lender could, in some cases, determine that "zero" cushion is necessary. This is untenable – some expenses (utilities, food, et al) are never smooth, and income can fluctuate for many workers.

We would caution the Bureau to not allow lenders to underwrite using the assumption that a borrower will receive a tax refund. While it is true that many of the households that use payday loans are also ones that receive a tax refund, there is never certainty about a refund.

We support the Bureau's intention (Proposed § 1041.9(b)(1)) to require a new ability to repay review for long-term loans upon an increase in a line of credit or the issuance of a new loan. Proposed § 1041.9(b)(1) creates exemptions for certain NCUA Payday Alternative Loans ("PALs") or for certain lower-cost loans when issued less than 5 times per year to the same borrower ((§ 1041.11 and § 1041.12) . While these loans have lower interest rates, they would still be allowed to charge fees of up to $50. As a result, they are still likely to be very costly. Moreover, if used repeatedly, borrowers still appear to be taking out loans that they cannot afford to repay. At the very least, this would establish a situation where a borrower stayed in debt for at least 180 days (four times 45). It would be more consistent to impose the same 90-day per year maximum in cases where a loan was granted an exemption.

§ 1041.9 Presumptions of Affordability, Loan Sequences on Short-Term Loans

As a means of triggering the need for a cooling-off period, the Bureau is proposing to a loan sequence window of 30 days. CFPB research[12] demonstrated a longer loan sequence standard would capture more incidents of repeat borrowing. But while most re-borrowing occurred within 14 days, an actual default tended to take longer to transpire [see table 22 in CFPB report][13]. Since the default is evidence that the borrower did not have the ability-to-repay a loan, a loan sequence standard that does not miss out on defaults is more appropriate. If there was no difference, then the difference might not be distinctive, but as empirical research shows, many defaults occur between 30 and 60 days.

A fourteen-day standard would be unworkable. By its very construction, the loan sequence protection would not be available to borrowers who are paid monthly.

Intuitively, a sixty day period makes sense because only then does it serve to work in tandem with the residual income test. Unlike shorter terms, sixty days is also the point where some debts can no longer be put off. For example, a consumer can generally be 30 days late on a utility bill. Utility expenses are generally bought on credit, as people consume those goods before they pay for them. Thus, only a 60-day loan sequence standard would manage to capture the cost of

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[12] CFPB, Supplemental Findings on Payday, Payday Installment, and Vehicle Title Loans, and Deposit Advance Products.
[13] ibid

utilities. Moreover, given that income and expenses fluctuate, a longer term does a better job of testing affordability.

Verification: § 1041.9 (c)(3) ii. We would like to reject the argument made by some industry members that "housing expense verification described in the Small Business Review Panel Outline was burdensome and impracticable for many lenders and consumers." In our opinion, to the extent that verification of housing expense is difficult, the problem is temporal. Technological innovation in payments should eliminate many obstacles. Payment forms will exist that can serve the same needs as provided to end-users by cash – high speed and immediate verification. They will do so, but additionally, those payments forms will come with rich messaging abilities that should answer the needs for adequate payment records.

The unique values of cash will soon be supplanted by electronic payments, and given that this should occur in the very near future, the idea that some payments will be unable to evidence is not legitimate. Currently, it is true some borrowers may be paying recurring expenses in cash. Cash is attractive for two reasons: first, a payment can be made immediately, and secondly, good funds are verifiable immediately.

At the same time, the concern mentioned by industry commenters over records is a possibility something that will be less and less of a problem going forward.

As payments are modernized, use of ISO 20022 standards will increase the amount of information that goes with any payment.

> "ISO 20022 is a robust financial messaging standard that supports the end-to-end flow of payment information from the originator to the beneficiary. Some of the great benefits of ISO 20022 payment messages include, but are not limited to: support for rich payment data, discrete fields to carry specific data elements (longer name fields, address information, and structured remittance, et al.), improved straight-through processing and compliance screening due to additional payment data, and facilitation of cross-border payments between U.S. wire transfer systems and the SWIFT messaging network."[14]

Cash is valuable because it is transacted immediately and because it offers real-time funds verification. But in the near future, both will be possible with electronic payments. If the United States can create a payments system on par with Japan or Singapore, then transacted will be authorized, settled, and funded in no more than five seconds. But payments won't only be faster, they will also be "smarter." Current electronic payments made via the SWIFT system have only 75 characters. But with the ISO 20022 system, which is already in place in many countries, more

[14] Federal Reserve Faster Payments, Resource Center for the Adoption of ISO 20022 for Wire Transfers and ACH Payments." May 10th, 2016

information about the payer and the payment will be included. For example, information in a payment will be able to include a payer's social security number or passport number[15].

> "Innovative new payment solutions are being developed to meet demands for greater speed and convenience, but these new solutions cannot easily provide a ubiquitous platform to allow a payment to be sent between any two end users. New payment products—such as tools that allow customers to pay in stores with their mobile phones, make payments via social media, and send instant person-to-person transfers between bank accounts or debit cards—have the potential to address many unmet needs in the market. For example, these tools can allow friends or family members to quickly transfer money to each other electronically rather than using cash or checks.[16]"

The CFPB rule refers to comments from the Small Business Review Panel stating "few consumers receive receipts or canceled checks for rent or mortgage payments, and bank account statements may simply state the check number used to make a payment, providing no way of confirming the purpose or nature of the payment."

That may be true now. Yet given that the Bureau expects the Final Rule to be in effect in 15 months, it is reasonable to incorporate a view that takes into account how markets are changing. While it will certainly be the case that consumers have been making and receiving certain payments without receipts, this is ultimately going to change. Accordingly, verification of records is probably going to be simpler in the near future. Moreover, given that it will work on mobile devices, accessing those records in a store will be easily facilitated.

Given that, the industry's contention that housing expense verification is burdensome is at best a momentary problem. While full payment messaging capabilities may not be implemented in the next few years, this will be commonplace in less than five years. Since it is possible that the final rule may not be announced for some time, and that there could be a period following that where litigation slows down the rule's enforcement, it is important the rule is written in a way that is sensitive to a change in payments messaging. The industry argument is not a legitimate position in the long run.

Moreover, the new payments system should be far more inclusive. The ISO 20022 is a robust messaging standard. Among its uses, it would give regulators the benefit of knowing much more about payers and payees, thus reducing safety and soundness concerns. The verification abilities undercut fraudulent check-writing. Thus, to the extent that some consumers are unbanked because they appear to be risky, some of those users would be clarified as not representing a risk.

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[15] Loos, Matt. "An industry Imperative: Swift FIN to ISO 20022 Migration. Banking Technology. March 20th, 2015. http://www.bankingtech.com/286072/an-industry-imperative-swift-fin-to-iso-20022-migration/

[16] Federal Reserve Faster Payments Task Force

As a result, for those that use cash for reasons other than good funds and immediacy, the new payments technologies will still serve their interests.

Our sense that electronic payments will become more and more common also underscores our opinion that it will be acceptable for lenders to collect data through digital formats, including photographs from mobile phones or scanned pdfs, and as mentioned in proposed comment 5(c)(3)(ii)(A)-1, those records could be through all varieties of permanently recordable electronic reproduction. We address concerns about record-keeping, storage, dissemination, and compliance of this data later in this comment.

As a result, we think that verification § 1041.9(c)(1) of all recurring expenses – including housing expenses – is a realistic expectation. The lender should have to collect this information, either in writing or in electronic format, and have the information stored for inspection.

Presumptions of Affordability, Loan Sequences on Longer-Term Loans

We believe that in the wake of this new rule, the nature of high-cost lending will change. Lenders will likely pivot toward longer-term products and away from single payment balloon loans. For this reason, the section on longer-term loans is very important. Given that some longer-term lenders report that more than 60 percent of their loans are refinanced[17], we think that the Bureau should look skeptically on claims that these loans are designed to be fully amortizing. We support the Bureau's proposal in § 1041.9(b) to prohibit the issuance of a longer-term loan without verification of an ability to repay.

To that point, we believe that the use of an outside registered information service would be a valuable requirement: We support proposed § 1041.10(a)(2) to require a lender to obtain and review information from its affiliates and from 3rd-party information systems providers about the consumer's borrowing history.

In our research of bankruptcy records filed by a lender against its borrowers, there were many cases where listings of assets and liabilities revealed cases where consumers had taken loans from short-term payday lenders as well as from covered longer-term installment lenders[18]. As well, there were cases where there appeared to be loan sequences. Because filings show the date and month of a loan origination, it is easy to see cases where a debt was extinguished in the same month that a new loan was originated, albeit with different lenders.

Because some longer-term loans include balloon payments, it is important to make sure that borrowers can make all the payments and then meet the last balloon. To that point, we support the Bureau's intention in proposed § 1041.9(c) to require that a lender verifies that a consumer can repay the balloon and still have the remaining residual income to cover expenses in the 30-day period after the loan.

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[17] World Acceptance, 2014 Annual Report.

[18] Examination of bankruptcy filings via the PACER system

If a borrower is more than 180 days delinquent on a current loan § 1041.2(a)(15), then the ATR standard should conclude that a new loan is unaffordable. We would argue that 180 days is too long, and instead, that being two months delinquent in a prior year or delinquent in the prior 3 months to be too much for a borrower to get a loan that qualifies for an affordability standard. We also wonder if a lender might extend a secured line of credit to a borrower in order to allow the consumer to then pay off an existing unsecured loan. This would deserve to be flagged and constitute a presumption of unaffordability.

The Bureau asks how an open-ended line of credit might be designed to evade ability-to-repay requirements. Certainly, current practice indicates that lenders will try to evade how they define the cost of credit. Some lenders use fees as a substitute for interest. Generally, fees that are attached to a loan should be taken into consideration as a part of the cost of credit. This would include origination fees, process fees, fees that add some kind of risk reduction (credit insurance), and fees that do not deliver a meaningful benefit of proportional value (auto club memberships, et al).

We support proposed § 1041.9(b)(1) which asks a lender to make an ATR review not only at the initial origination of a new line but also when a credit line is under consideration to be increased. An increase is potentially a way to simulate a rollover. Indeed, in order to protect against a line of credit being used as a means to opaquely roll over a loan, it should be an expectation that a borrower has paid down their line of credit and then waited for sixty days. Moreover, the same 90-day cap on indebtedness should be in place here. Because some lenders can charge a fee even for unutilized credit, it should be the case that a day counts under the 90-day criteria not just when the line of credit has a balance, but also at any time when an unused line is still generating incremental fee costs.

In proposed comment 1041.9 (b)-2.ii, the Bureau suggests that some borrowers may be able to repay a longer-term loan with savings, and accordingly, lenders could use that assumption as the basis to claim that a borrower had the ability to repay a loan. We think this is very doubtful, as we believe that the decision to pay the cost of a payday loan is very nearly mutually exclusive of the ability to make regular contributions to a savings account.

§ 1041.10 Additional limitations on lending—covered longer-term loans
We support the intention by the Bureau to consider a loan unaffordable if a borrower has an existing loan that he or she cannot pay. Applying that principle to cases where non-covered loans are delinquent is an important detail here. But we oppose the proposed comment 10(c)(1)-2 that would provide an exception of the outstanding loan is with a different lender. To the Bureau's concern that a lender would find it difficult to verify this, we believe that this could be mitigated if the lender referred to a credit information service (as proposed § 1041.16(c) and in § 1041.17(c)(2).

Proposed § 1041.10(c)(1)(iv) We support the proposed intention to consider a refinance loan unaffordable if the only perceivable benefit to the borrower is to skip a payment and if the

outstanding principal balance is increased. This is evidence of a coercive practice. In particular, we are concerned about cases where an installment loan serviced under the "rule of 78ths” is refinanced in this manner.

A related concern is the use of non-file insurance with loans that are secured by personal property. Anecdotally, we believe that some consumer installment lenders ask for an interest in personal property only as a means to give them more leverage in collections, with the aim of provoking refinances by distressed borrowers.

We believe that it is deceptive to charge consumers a fee to compensate a lender for the purchase of non-file insurance in cases where the lender has also taken a security interest in personal property.

By imposing a presumption of unaffordability when a lender refinances an outstanding loan where the borrower has repaid less than 75 percent of the original loan balance, the Bureau will create a substantial impediment to a lender who is trying to create a repeating cycle of new loans.

Proposed § 1041.10(c)(2)(ii) – Exception to Presumption of Unaffordability if new loan lowers the cost of credit. In 1041.2(a)(18), the Bureau proposes to define the cost of credit as an “all-in” metric, rather than a traditional APR, and to cover some loans if they have an all-in credit cost of more than 36 percent. We strongly support this idea. Also, we want to specify that one element of an “all-in” number should be the fees charged for credit insurance. We see examples of loans with interest rates of approximately 30 percent, but with additional credit insurance fees of more than one thousand dollars. Consider this example:

Table: Terms of a Longer-Term Loan bearing an interest rate below 36 percent, but with add-on fees that dramatically increased the real cost of borrowing:

Loan Terms	
Loan amount	10,444
Annual percentage rate	25.63 percent
Number of payments	48 (monthly)
Payment amount	$350
Total of Payments	$16,800
Credit Insurances	
Single-premium credit life	$316
Single-premium disability	$1,053
Involuntary Unemployment	$924
Other fees (not credit insurance)	$145 (some paid at origination)

Source: PACER records, Illinois courts

Of the $10,444 borrowed, $6.761 was used to pay off an outstanding debt to the lender making the new loan. The borrower received only $1,295.

§ 1041.12 Conditional exemption for certain covered longer-term loans of up to 24 months' duration.
The Bureau has asked for comments on a proposed alternative method of underwriting, based upon a formula that grants an exemption to loans where default rates are greater than 5 percent.

This is the wrong approach, because while it would generally make lenders conform to underwriting principles, it would still mean that a percentage of borrowers fell into debt traps. May individuals would be harmed. Moreover, the rule would always be catching up to problems: consumers would have to be harmed before the Bureau stepped in to correct a problem.

Of particular concern would be the possibility that a loan performance approach would treat a loan refinance as a successful repayment. Additionally, this approach would have the unintended consequence of encouraging lenders to pursue overly aggressive collection techniques.

While an exemption for lenders that can demonstrate default rates below 5 percent is built upon faulty logic, the use of loan performance data as the basis for enforcement is valid. We can see an approach where the Bureau flags lenders where default rates exceed a high threshold. The basis for an appropriate threshold is derived by comparing the performance of credit card portfolios that hold debt from consumers with similar credit characteristics as those served by lenders. Federal Reserve data shows that near-prime credit card default rates are usually below 5 percent, but even in times of great financial distress, default rates of low-credit borrowers never went past 10 percent. For that reason it would be fair to start with a 10 percent default rate as a threshold mark for beginning an inquiry.

The key difference of an approach that keeps ATR but then complements it with enforcement on the back end when performance is poor is that portfolio would still have been made up of loans that were underwritten. This approach means that all lenders are held to an ATR standard, but at the same time, there is a second tool at the disposal of the CFPB that permits empirical data to support enforcement action when the evidence suggests that a lender is not properly underwriting.

SUBPART D—PAYMENTS

1041.13 Identification of unfair and abusive practice.
1041.14 Prohibited payment transfer attempts.
1041.15 Disclosure of payment transfer attempts.

§ 1041.13 Identification of unfair and abusive practice.
One of the most damaging aspects of payday lending, particularly in connection with loans that have been refinanced, are the problems that stem from unauthorized debiting after a previous

payment request failed. Part of the business model of payday lending – either at a storefront location or via an online lender – is to have access to a borrower's checking account.

But in some instances, lenders have chosen to continue to debit even after a payment has been returned for insufficient funds. As a result, borrowers are likely to owe additional funds to their bank for overages (overdraft, NSF, and extended overdraft[19]). Because so many loans are refinanced, it is all too often the case that payments fail. In fact, one study found that 46 percent of online borrowers report that their bank accounts have been overdrawn[20]. According to a recent study, 25 percent of all payment transfer attempts made by payday lenders are rejected, compared to just 2/5ths of 1 percent of requests made by department store, utilities, or credit cards[21].

Even more concerning, one-third of online borrowers said that their account had been debited against their will. Some lenders have actually made it a practice to debit an account even after the debt obligation has been extinguished. Sometimes the debits were requested by companies that were unfamiliar to the borrower, perhaps because the loan was routed through a lead generation service.

All of this underscores why the Bureau is right to target these practices as worthy of supervision and enforcement (UDAP, UDCPA).

Because many of the instances of unauthorized debiting stems from loans originated through tribal lenders, it is particularly important that the Bureau apply these rules to all lenders, regardless of their means of incorporation.
The Bureau's rule should address a number of practices that have been demonstrated to impact borrowers:

- Repeat presents, even after earlier requests were rejected.
- Debiting in small amounts, presumably in order to recover part of the outstanding debt obligation, even after a previous failed attempt.
- Debiting at times not authorized – for example, after several days as opposed to the next pay period.
- Debiting without authorization.
- Debiting accounts that have been closed.

[19] Rust, Adam. The Secrets of Overdraft: How Banks are Making Billions on our Small-Dollar Mistakes."
http://www.reinvestmentpartners.org/overdraft/
[20] Payday Lending in America: How Borrowers Choose and Repay Payday Loans, February 2013, 32–35, http://www.
pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2013/PewChoosingBorrowingPaydayFeb2013pdf.pdf
[21] RDFI Return Rate Analysis, NACHA Q4 2014

In each case, these practices put the borrower at risk of experiencing collateral damage from bank fees. This leads to debt traps. On its own, the market is not likely to resolve this concern. The cost to a lender of a failed attempt is de minimis but very high to the borrower.

§ 1041.14 Prohibited payment transfer attempts.

It is a common practice among lenders to repeatedly debit account until good funds are available[22], but in the process, consumers may be charged overdraft and insufficient funds fees. In some cases, closed accounts have been re-opened by banks upon receive a request for payment. As a result, some consumers have ended up with large debts on accounts that were otherwise settled upon closure, resulting not just in an overdraft or an NSF fee, but also extended overdraft fees.

The CFPB's own research reveals that the majority of payment requests that were returned unpaid once were also returned unpaid during the next pull[23], and that with each additional attempt, the percentage of payment requests that were returned unpaid increased.

Current industry safeguards reflect a will to protect consumers, but those good intentions are not matched by aggressive enforcement. Under the best practices at NACHA, originating depository financial institutions are expected to cease to serve clients when more than 1 in every 200 of their payment requests are returned. But recent history shows that this "best practice" is sometimes not followed (Four Oaks Bank, et al.[24])

Proposed § 1041.14(a)(1) would define a payment request as one initiated by a lender from a consumer's account in connection with a loan. We would add more specificity. Because it is possible that a lender could seek to debit an account held in a non-bank "pocket" that was held as pooled funds, this could lead to an evasion. Also, the notion of a lender would be better expanded to include agents of a lender. Mortgage lenders rarely initiate payments. Instead, mortgage lenders assign a servicer to collect payments on their behalf. Once securitized, MBS proceeds are divided and allocated by agents of the investors who hold an interest in the bonds. The rule should be written to prevent payday lenders from using proxies to request payment. This would be particularly important of payday loans were ever bundled into some kind of asset-backed security. This should affirm the Bureau's general intention to use a broad payment transfer definition under proposed § 1041.14(a)(1)(i) through (v) and to allow for a lender to include the agent of a lender in proposed comment 14(a)(1)-2 e.

We ask the Bureau to strengthen proposed § 1041.14(b). We request that the CFPB require reauthorization from a consumer after the first payment pull is denied for inadequate funds. Additionally, this maximum should be applied when a lender tries to initiate payment transfers

[22] First Cash Financial 2014 Annual Report
[23] CFPB, CFPB Online Payday Loan Payment
[24] https://www.justice.gov/usao-ednc/pr/united-states-attorney-announces-settlement-bank-accused-consumer-fraud

after gaining re-authorization to pull after a previous failed attempt sequence (proposed § 1041.14(b) and (c)). In other words, after re-authorization, the failed payment clock starts again, but it times out after one new failed attempt – not two.

The Bureau's own research shows that after an initial payment request fails, it is very likely that subsequent attempts will also fail. With two attempts, a borrower may have been charged $100 or more in NSF fees. At a later point, the borrower's bank might choose to close the account against the consumer's will. The Bureau's research found that in cases where a payment was denied two or more times, 43 percent of accounts were closed[25].

Upon a failed payment transfer (a "pull" in all of the definitions proposed in § 1041.14(a)(1)(i)), a lender should have to seek re-authorization from a consumer before being able to make another payment request. The ceiling should include the sum of all pulls, so that a lender could not debit once through a remotely created check and then a second time through an ACH, for example, as contemplated by the Bureau in proposed § 1041.14(a)(1).

With regard to proposed comment 14(b)-2, we consent to a caveat that a single failed payment on one covered loan would not preclude future properly originated loans from being facilitated by some kind of pull payment. But we believe that some future loans would not be suitable for this privilege. For example, a subsequent loan that was originated immediately after (or within 14 days) of the prior loan – should not be granted the right for an additional pull if any loan in the loan sequence had already had a failed payment transfer request and future pulls were not yet re-authorized by the consumer.

To the Bureau's request for comment on whether or not the Bureau should provide additional examples of methods for debiting: it may be possible that a lender could attempt a P2B payment through a non-bank. As well, while it may be that this method would be covered by the methods already proposed, we would like the Bureau to clarify that remotely created bank accounts (i.e. instant issue online prepaid debit cards) would also be covered.

In some instances, banks have a policy of only allowing their account holders to cancel a future ACH pull if the consumer can indicate the exact amount of the request[26]. Given that this is common, the Bureau should make sure that lenders are not able to debit accounts for amounts different than the sum called for in the loan contract. Some lenders try to initiate a series of smaller payments. That practice would undermine the ability of a consumer to control access to his or her account.

We are also concerned that a lender would ask a borrower to fill out a series of authorization forms, to be utilized by the lender after a failed authorization, in order to overcome the re-authorization requirement. In essence, this would amount to a lender evading the intent of the law by making it a condition of credit for a borrower to provide a re-authorization for payments

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[25] CFPB Report on Supplemental Findings
[26] Regions Bank, Frequently Asked Questions, http://www.regions.com/FAQ/ lost_stolen.rf

in the future. The Bureau has mentioned this in proposed § 1041.14(c)(3)(iii). We think that it would be important for re-authorization to not occur until after a re-authorization has been prompted and after the proper disclosures have been given to the borrower (Proposed comment 14(c)(3)(ii)-1). At that point, the borrower should then be given the right to decline a re-authorization. If the borrower does consent, then the borrower should do so through written authorization.

Additionally, we do not believe that NACHA's new 15 percent rule would adequately replace the need for a failed payment transfer ceiling, and as such, it is not reasonable to follow the recommendation to delay the proposed restrictions on withdrawal attempts. As the Bureau notes, the NACHA rule would have no impact on efforts to collect that were made via other payment processing instruments. But moreover, the NACHA rule is only a guideline. Members of NACHA are not subject to any enforcement provisions by the association. In response to the Bureau's request for input on whether it would be appropriate to see if NACHA's 15 percent return rate threshold bears fruit as an effective method, we would say that this is not advisable. The Bureau should recognize that if 15 months do pass between the final comment period day and the application of the Final Rule, then enough time will have passed to answer that question in the first place.

§ 1041.15 Disclosure of payment transfer attempts

Additionally, we believe that consumers will benefit from the disclosure requirements in proposed comment 1041.15. Consumers need advance notice of a future pull, and in turn, lenders should be required to verify their consent with either a digital or print signature.

With regard to § 1041.15(d) and proposed § 1041.15(a)(4)(i), we think that email should only be valid if the consumer has indicated that they are willing to accept email delivery. While it would be reasonable to allow a voice contact in tandem with electronic and print notification (§ 1041.15(d),) we do not think a disclosure should be allowed to be delivered in print via a mobile phone.

Upon re-authorization, the disclosure should indicate the amount and date of the new payment transfer request, as in proposed § 1041.15(b).

We support a model form (proposed § 1041.15(a)(7) that identifies the name of the lender, the date of the pull, the account number (last four digits) (truncated as in proposed 15(b)(4)(ii)(C)), the mode of collection (deferred check deposit, remote check, ACH, et al), and the name of the ODFI. As well, we support Proposed § 1041.15(b)(4)(v); the model form should include contact information that the borrower can utilize to contact the lender or the servicer.

Lenders should offer a model form in the language of the consumer's preference (Proposed § 1041.15(a)(8)).

Because credit insurance serves as a credit enhancement, premiums should be viewed as a part of the overall cost of credit. Accordingly, we believe that credit insurance premiums should be factored into the calculation of an Annual Percentage Rate ("APR"). In some cases, the addition of those fees to the APR may move a non-covered long-term loan into one that must be evaluated under either Section 7 or 1041.5, because it might force the APR to move across the 36 percent threshold. Additionally, a disclosure on the cost of credit insurance should indicate if the lender received a financial incentive from the insurer, and if so, a percentage number showing the amount of the premium that has been devoted to paying the incentive. Finally, the form should show the APR without the purchase of an insurance product to make clear the cost of the credit insurance.

We believe that many lenders sell credit insurance, knowing that the credit enhancements are a benefit to their risk exposure. This raises the concern that the sale of credit insurance could become a condition of offering credit. We affirm the Bureau's intention to use the leverage associated with the cost of credit disclosure to de-link the sale of credit insurance with the acceptance of a loan application. We can support proposed § 1041.2(a)(18)(i)(A) and (B) and § 1041.3(b)(2)(ii).

SUBPART E—INFORMATION FURNISHING, RECORDKEEPING, ANTI-EVASION, AND SEVERABILITY

1041.16 Information furnishing requirements.
1041.17 Registered information systems.
1041.18 Compliance program and record retention.
1041.19 Prohibition against evasion.
1041.20 Severability.

§ 1041.17 Registered information systems.

A registered information system should be designed to accept data from lenders about new loan amounts (§ 1041.16(c)(1)(vi)), loan performance, and loan closure (among others). They should also be able to disseminate information to lenders that they can use prior to the consummation of a new loan. An RIS should be able to aggregate loans from all lenders, and then to distribute information about loans to all lenders.

To make this work, lenders should keep information on a loan-level basis (proposed § 1041.16(c)(1)(i)) and then be able to pass on information on a borrower-by-borrower basis (proposed § 1041.17(b)(2).

Consumers should have the ability to review the information that the RIS has recorded in its files and have the right to dispute those records. Under FCRA, consumers are entitled to receive

information about why their application was denied. We think that this would be useful and valid in the case of longer-term loans, where some borrowers are denied credit.

The use of an RIS should not mean that lenders can now identify new customers and then subsequently solicit offers of credit to those individuals. This would be incredibly harmful. Under the Fair Credit Reporting Act, consumers have the right to control where and how their information is disseminated. An RIS should not be allowed to generate these lists. The Bureau asks if this could be helpful. We believe that the history of the payday lending industry shows that competition is not effective. Prices are not driven down by a new supply of debt, and in fact, the standard is that interest rates are usually at the maximum level allowed by law. The idea that consumers would benefit if lenders had the ability to tap lists and then make pre-screened offers of credit is not realistic.

§ 1041.18 Compliance program and record retention
Duration of record retention: we agree that a 36-month period is appropriate, both for records related to residual income *(Proposed § 1041.18(b)(2)(i) and (b)(2)(ii))* as well as for loan documents, credit information, payment histories (Proposed § 1041.18(b)(5)(iv)), and evidence of returned payments (*Proposed § 1041.18(b)(1)*). Consumers should have the right to see this information and to receive a copy of that information for free, in either a paper or digital format, upon request. These expectations make possible the enforcement provisions given to the Bureau under Dodd-Frank.

The Bureau asks for comment on the burden imposed on lenders for storage of this information (proposed § 1041.18(b)(1) and if it acceptable to store the data in a pdf versus a search electronic form. In our opinion, searchable electronic formats are a legitimate expectation. It is hard to imagine that data would be stored in an electronic format that was not searchable – i.e. Excel. In fact, the act of printing a pdf or a paper copy is an additional step. Thus, in our opinion, requiring that records be kept in a tabular electronic format is reasonable *(§ 1041.18(b)(2*))

We support the proposal to make these retention requirements standard for approved loans.

Reasonable Inferences in Ability-to-Repay Determination § 1041.18

In the spirit of verifying that a lender's ATR calculation is reasonable, it seems fair to implement a review process. In this approach, the CFPB could flag for review the practices of any lender if and when its loan portfolio performs unusually poorly over a period of time. The sample period would need to be long enough to create a fair basis for review, but not so long as to allow a substantial number of borrowers to be harmed before regulatory intervention occurred.

The Bureau should examine the record-keeping programs in place at payday lenders. The Bureau should make sure that the private information of consumers is kept confidential. In our work with tax refund shops, we found repeat instances where tax preparation companies had no systems in place to make sure that client information was protected. We support the intention of proposed §

1041.17(b)(4), and we hope that the Bureau will develop a more robust plan of supervision and enforcement going forward.

Electronic Records in Tabular Format Regarding Origination Calculations and Determinations for a Covered Loan Proposed § 1041.18(b)(2)

In order to monitor compliance with ability to repay requirements in §§ 1041.5 and 1041.6 and §§ 1041.9 and 1041.10, it is absolutely necessary that lenders keep records of how they came to an ATR determination. Storing that information in a tabular file will facilitate supervision by making it more difficult for lenders to point to unexpected data retention problems as a reason for non-compliance with data reporting.

To proposed § 1041.18(b)(3): In our opinion, accepting records in an electronic format should actually save costs for lenders. If they had to store paper records, this would be costly, as would the process of making duplicates for the purpose of potentially making them available to the CFPB.

Section 1041.19 Prohibition against Evasion

The Bureau's proposed § 1041.19(a)-2.i.B would protect consumers from what seems to be a likely practice: lenders very well might offer an incentive to consumers to secure a leveraged payment mechanism (a pull as described in § 1041.2(a)(1) or directly from an employer in § 1041.3(c)(2)) or a secured interest in personal property, or alternatively, might impose a "detriment" upon consumers that refused to assign access to their account or an interest in their vehicle. The Bureau asks if the protection should be for 72 hours or for a period beyond. We believe that this kind of incentive could be offered at any moment up to the date the loan is due. Indeed, it seems possible that it could be an element of a negotiation in a debt collection attempt. Thus, we would prefer the Bureau to opt for a protection beyond the proposed 72-hour window after origination, and also, to make an otherwise non-covered loan one that is covered if the lender attempts to change the terms of a loan to secured by a leveraged payment mechanism or access to a title.

We are concerned that the quality of data could be compromised by missing information in certain variables. This is a real concern. Even banks, which are generally held to high standards for internal controls, have a consistent record of omitting some variables in their HMDA reports. National City Bank was infamous for this practices. Their fifty or so affiliates all consistently omitted some data, leading a person to come to the conclusion that omission was a stated expectation of higher management. An enforcement provision for record retention of covered loans should include specific language for the consequences of data omission.

The Bureau should regularly vet records for the degree of data omissions. For instances when lender records show an ongoing practice of omission, the Bureau should request an explanation from the lender. Potentially, the Bureau should be able to penalize lenders for the omission of data.

We share the Bureau’s concern (*proposed comment 1041.19- 2.iv*) that a lender might utilize a deceptive practice of breaking up a request for payment into two or several smaller requests, in order to reduce the chance of triggering the requirement for reauthorization. We support specific language to prohibit this practice. A ceiling of one failed request should curb this practice. Lenders will be unlikely to request less than the full payment and as a result, the CFPB will have closed a potential loophole.

We agree with the Bureau's concern that lenders may evade the three loan cap by reporting late fees or fees for non-payment on a first loan, rather than acknowledging that those fees are actually the cost for a rollover. Otherwise, this is an evasion (Section 1041.19). The Bureau should have the ability to challenge a lender that attempts to characterize recurring late fees as the expense on a single balloon payment loan. As the Bureau comments, the "actual substance of the transaction would be what mattered." (Proposed comment 19-1) This is a plausible concern for short-term and longer-term covered loans.

CONCLUSION

We are very concerned that the net effect of this rule will be to only reduce the most tragic of debt traps. Because the rule, as proposed, would still allow a consumer to receive six loans before an ability-to-repay determination was made, the rule could have the effect of permanently endangering vulnerable consumers to the threat of usurious payday loans.

We would like to finish with a personal story from one of our former board members. This person works at a CDC near the North Carolina-South Carolina border. Just this week, she served a client who had received a payday loan in South Carolina. Her comment shows the danger posed by these loans:

> *Just this morning, I reviewed a loan from a payday lender in South Carolina. The interest rate was 304.17%. The loan was $621.00; the finance charge was $1,402.44. The total paid to the South Carolina payday lender was $2,023.44 for a loan of $621.00, minus $20.00 for a lien filing fee. This is a gross injustice to the poor people who in this case, doesn't understand. My client is a tenant in supportive housing.*

This loan was made to a citizen of North Carolina. This speaks to a concern that encompasses all of the questions presented by the rule. Specifically, as an organization that comes from a state that has already extinguished payday lending from its borders, we want to make sure that this rule will not have the effect of letting this product back into our state.

We ask the CFPB to honor state laws that have rate caps in place. The CFPB's final rule should declare that loans made in violation of state law are unfair, deceptive and abusive. The Bureau should acts as a complementary force, honoring current state law and then applying its robust enforcement authority to enhance efforts to protect consumers.

We urge the Bureau to write a strong rule. In our opinion, the ability-to-repay requirements are for the most part well-devised. The exemptions are the problem, as they leave open the ability for lenders to still originate millions of loans that were not underwritten under an ability to repay requirement.

Thank you for your service to consumers.

Sincerely,

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APPENDIX: PAYDAY LOAN BORROWERS IN NORTH CAROLINA TELL THEIR STORIES

“I was behind in my car payment. It was just that one time I didn’t have the money. But I never did have the $200 to go on and pay the payday lender, so I kept renewing – just for that one time. Now I know that I spent more than $2,000 over a two-year period, just for that one $261 loan.”

- Constance Odim

“I’ve been using payday lenders for eight or nine months to pay my bills. I go to two of them every two weeks like clockwork. The money never even makes it to the drawer before they ... count it right back to me, minus the interest. I haven’t been able to give them the money and walk away. If I could get rid of the check loans I would be in a whole better way. It is worse than crack. You’ll keep going back, keep going back just to get your bills paid.”

- Melissa Barnes

"God's been good. But He has some more good than He has given me. I have four [payday lenders]. On a monthly basis, I pay $350 worth of interest. That's my car payment right there in interest. I am making two car payments, but I have only one car. In a way, they are doing a favor for people, but in the long run, it's not a favor. You have to pay them to get your money back so you can pay somebody else. It's not designed so you can get yourself together — it's designed for you to come back to them."

- Larry Smith

"I was unemployed and needed quick money to pay a bill. I had heard of Advance America, where I could write a postdated check ... and go buy it back in two weeks for a small fee. Or what was a small fee back then? I thought, you know, free money. Right now I'm kind of stuck with them. I've got a check for $300 outstanding and I've been unable to roll it over or buy it back. I think it is definitely a good service for people, but not for their target audience, people who are short on money. Their rates can be so high that it is pretty much impossible not to get in a cycle there."

- Nick Burks

“Which payday lender did I use? I used five. I went because I was on disability and my check only comes at the end of the month. I told them I couldn’t pay every two weeks.... I had to go to the other ones, and this is how I got hooked. I got arrangements with all of them. I owe about $1,000. It is a nightmare. I warn people if you don’t have to mess with them, please don’t. You can get hooked on them ... so I warn, if you don’t have to, please don’t.

- Bernice Stewart Yon

“Different things were going on. My boss couldn’t make payroll, I was drawing unemployment, I had just purchased a house ... the AC broke down. I had four [payday lenders] at a time. I owed $1,200. Now I owe $900. They are harassing my references, my friends about my debt. ‘Can you have Tina Brown contact us? Can you have her to call?’ I am in a vicious cycle and I don’t see a way out.”

- Tina Brown