September 15, 2022

Via Electronic Mail

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street N.W.
Washington, D.C. 20552

Re: Petition for rulemaking defining larger participants for personal loans

Dear Director Chopra:

The Center for Responsible Lending (CRL) and the Consumer Bankers Association (CBA) jointly petition the CFPB, pursuant to section 553(e) of the Administrative Procedure Act, to engage in rulemaking to define larger participants in the market for personal loans.

CRL is a nonprofit, non-partisan research and policy organization dedicated to protecting and expanding home ownership and family wealth and working to eliminate abusive financial practices. CRL is an affiliate of the Center for Community Self-Help, one of the nation's largest nonprofit community development financial institutions.

CBA is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

Although our views on consumer financial regulatory issues often diverge, CRL and CBA share a common belief that the absence of a rule defining larger participants in the market for personal loans has created an unlevel playing field and a large risk to consumers that the Bureau can and should resolve through a larger participant rulemaking.

<u>**Background**</u>

Traditionally, the market for consumer credit has been divided into five segments: mortgages (including home equity loans, and home equity lines of credit (HELOCs)); credit cards; auto loans; student loans; and a category that this petition refers to as "other personal loans." The last category encompasses three types of loans: short-term installment loans, which typically range from three-months to one-year; longer-term loans; and revolving loans or lines of credit. These other personal loans may be unsecured or secured. The secured loans in the other personal loans category include both loans to finance the purchase of some durable goods (for example, an appliance or mobile home) as well as loans backed by a security interest in some existing property of the borrower, typically a motor vehicle. The other personal loans category excludes loans secured by an interest in real estate, as those loans would fall within the mortgage category.

The Dodd-Frank Act gave the Bureau plenary supervisory jurisdiction over any non-depository involved in originating or servicing consumer mortgages[1] or in offering any private education loan" without regard to the entities size.[2] The Bureau also has supervisory jurisdiction of the larger participants of a market for other consumer financial products or services, provided that the Bureau first define, by rule, what constitutes a "larger participant" in a specific market in consultation with the Federal Trade Commission.[3] The Bureau has exercised that authority to cover, among other markets, automobile financing, thereby enabling the Bureau to supervise any nonbank covered person that originates at least 10,000 loans per year to finance the purchase of an automobile or the refinancing of such a loan.[4] The credit card market currently is dominated by depository institutions because a bank charter is a prerequisite to accessing the payment rails (although, as discussed below, some non-depositories are making inroads into credit cards through so-called "bank partnerships"). As a result, the "other personal loans" remains the one category of consumer lending as to which the Bureau can supervise only large depositories but *not* large non-depositories.

In the fall of 2015 the CFPB announced as part of its regulatory agenda that, after issuing the larger participant rule governing auto loans, "The Bureau expects next to develop rules to define larger participants in markets for consumer installment loans and vehicle title loans."[5] In the spring of 2017 the Bureau reported in its regulatory agenda that it "is now working to develop a proposed rule that would define nonbank 'larger participants' in the market for personal loans, including consumer installment loans and vehicle title loans."[6] That work continued through at least the fall of 2017.[7] However, in the spring of 2018 the Bureau announced in its regulatory agenda that its Acting Director had decided to reclassify this rulemaking as "inactive" in the "expectation that final decisions on whether and when to proceed with such projects will be made by the Bureau's next permanent director."[8] Since then, the Bureau has not spoken to this subject.

<u>The Need for a Larger Participant Rulemaking</u>

Petitioners believe the Bureau should resume work on and complete the larger participant rule on which it was working for the following reasons.

First, the market for other personal loans touches millions of consumers. Equifax reports that as of May 2022 there were almost 85,000,000 installment and revolving loan accounts and over $125 billion in outstanding balances, which is actually more than the total number of mortgages (including home equity loans and HELOCs); although, of course, the total unpaid mortgage

[1] 12 U.S.C. § 5514(a)(1)(A).
[2] 12 U.S.C. § 5514(a)(1)(D).
[3] 12 U.S.C. § 5514(a)(1)(B).
[4] 12 C.F.R. § 1090.108. In addition issuing a larger participant rule covering automobile financing, the Bureau also has issued rules that cover credit reporting, 12 C.F.R. § 1090.104, debt collection, 12 C.F.R. § 1090.105, student loan servicing, and international money transfer, 12 C.F.R. § 1090.107.
[5] https://www.consumerfinance.gov/about-us/blog/fall-2015-rulemaking-agenda/.
[6] 82 Fed. Reg. 40386, 40387 (Aug. 24, 2017).
[7] https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201710/Preamble_3170.html.
[8] https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201804/Preamble_3170.html.

principal balance dwarfs that for other personal loans.[9] And these numbers undoubtedly understate the size of the market both because of underreporting in certain sub-segments within the personal loan market – for example, vehicle title installment loans and buy now, pay later (BNPL) loans – as well as potential confusion with respect to the reporting of loans secured by a vehicle.

Second, there is strong reason to believe that the personal installment loan market is growing and will continue to grow at a rapid pace. For example, Equifax reports that in the first four months of 2022, 10.99 million new loans were originated, which represents an increase of 22% over 2019 (the last pre-pandemic year).[10] Direct mail solicitations for personal loans – a category "dominated by monolines and fintechs" – are up by a whopping 104% in the first six months of this year relative to 2019.[11] And again, this does not capture the seeming explosive growth in BNPL loans which grew by 530% in California alone from 2019 to 2020.[12]

Moreover, recent changes in state law portend future increases in loans that would fall within the other personal loan category as several states have recently enacted laws that effectively prohibit payday lending because of limitations placed upon either the permissible interest rate[13] or the permissible payment size[14] while raising the permissible APR on short-term personal installment loans. In Colorado, for example, after a 2018 referendum placed a cap on the interest rate for "deferred deposit" loans at 36% some of the erstwhile payday lenders, and most of the preexisting payday loan volume,[15] migrated to what are termed "Alternative Charge" loans with a minimum term of 90 days and permitted APRs over 100%.[16] Similarly, in Ohio, after the enactment of law that capped monthly payments at either 6% of a borrower's verified gross monthly income or 7% of verified net monthly income for loans with terms of less than 91 days, while substantially increasing the permitted APR for loans under $1,000 with a term of up to one year in duration,[17] there was, what one researcher has termed, a "dramatic shift to installment lending."[18] Two other states have recently enacted laws that likely will have similar effects.[19] Note that these laws – which Pew Charitable Trusts is actively championing – arguably will truncate the Bureau's plenary

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[9] Equifax, *U.S. National Consumer Credit Trends Report: Portfolio* at p. 68 (June 24, 2022), https://assets.equifax.com/marketing/US/assets/EFX_PortfolioCreditTrends_202205.pdf.

[10] Equifax, *U.S. National Consumer Credit Trends Report: Originations* at p.76(July 25, 2022), https://assets.equifax.com/marketing/US/assets/EFX_OriginationCreditTrends%20202206.pdf.

[11] The Epic Report (Aug. 6, 2022), https://www.epicresearch.net/fintechs-dominate-personal-loans/

[12] https://dfpi.ca.gov/2021/10/07/dfpi-report-shows-changes-in-consumer-lending-decrease-in-pace-program/

[13] As is the case in Colorado.

[14] As is the case in Virginia, Ohio, and Hawaii.

[15] *Comparison of 2018 vs. 2019 Small Dollar Lending*, *https://coag.gov/app/uploads/2020/11/Annual-Report-Composite-Comparison.pdf*.

[16] 5 CO. Rev. Stat. § 5-2-214(2).

[17] Ohio House Bill 123, 132nd General Assembly, *codified at* OH Rev. Code § 1321.39(B)(2) (requiring that monthly payments for loans with terms of less than 91 days cannot exceed 6% of the borrower's verified gross monthly income or 7% of verified net monthly income).

[18] Policy Matters Ohio, *Creating security, expanding prosperity: Reforming payday lending in Ohio* (2020), https://www.policymattersohio.org/research-policy/shared-prosperity-thriving-ohioans/consumer-protection-asset-building/creating-security-expanding-prosperity.

[19] VA House Bill 789, 2020, *codified at* Code Va. § 6-2-1816.1 (requiring that monthly payments for loans with terms of less than four months cannot exceed 5% of the borrower's verified gross monthly income or 6% of verified net monthly income); HI H.B. 1192, 31st Leg (2021), https://www.capitol.hawaii.gov/session2021/bills/HB1192_CD1_.HTM (requiring minimum loan term of two months for loans of $500 or less and four months for loans up to $1,500).

jurisdiction over payday lenders making a larger participant rule that encompasses other personal loans all the more important.

Third, a sizable portion of consumers who use other personal loans – especially consumers obtaining those loans from non-depositories – tend to be economically vulnerable consumers who either cannot obtain credit via credit card or HELOC, have exhausted their available credit, or have acquired so much debt that they need to refinance. Equifax reports that roughly 35% of all originations for personal loans are for subprime consumers[20] and TransUnion reports that 44% of unsecured personal loans are held by non-prime consumers; those figures almost surely understate the share of personal loans going to such consumers since many nondepository lenders – including, for example, tribal lenders and vehicle title lenders – do not report their loans to the national consumer reporting agencies. Indeed, a study limited to non-depository lenders found that 24% of borrowers were deep subprime (<551) and another 44% were subprime (< 620); the default rates for these two groups were 35% and 22% respectively.[21] A second study, drawing data from a different set of non-depository lenders, found that the median borrower had an income of just $35,000 and found that 34% of loans were not repaid in full.[22]

Here, too, there is reason to believe that there will be further growth in personal loans issued to these vulnerable populations. Indeed, TransUnion reports that the growth in personal loans is "be[ing] driven by the nonprime tiers" which account for 70% of new originations.[23]

Moreover, among so-called fintechs there has been a substantial growth of firms targeting the subprime market and offering loans that consumers are struggling to repay. This is apparent from SEC filings of those companies which are publicly traded. OppFi, for example – which describes itself as a "financial technology platform…for everyday consumers who lack access to mainstream financial products"– offers loans with an average APR of 150%;[24] it reports that its originations in the second quarter of 2022 were up by over 50% year-over-year and that its net chargeoffs (after recoveries through collections) exceed 50% of average receivables.[25] Elevate, another fintech subprime lender, reports year-over-year growth of 33% and chargeoffs equal to 55% of revenue; its products have an average "effective APR" of 95% (for lines of credit) and 100% (for installment loans).[26] And among non-publicly held fintech lenders, the Internet is replete with offers for products with APRs as high as 450%,[27] 490%[28], and even 699%.[29]

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[20] Equifax, *supra* n.8.

[21] Durkin, Elliehausen & Hwang, *Rate Ceilings and the Distribution of Small Dollar Loans from Consumer Finance Companies: Results of a New Survey of Small Dollar Cash Lenders* (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533143.

[22] Beales & Goel, *Small-Dollar Installment Loans: An Empirical Analysis* (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2581667.

[23] TransUnion, *Credit Industry Insights Report* at 67 (Q2 2022), https://onlinexperiences.com/scripts/Server.nxp?LASCmd=AI:1;F:LBSATTACH!V&AttachmentKey=8489689.

[24] Annual Report, https://d18rn0p25nwr6d.cloudfront.net/CIK-0001818502/a0490c2b-cfa1-4372-aa0a-13cdcf3708be.pdf.

[25] https://investors.oppfi.com/news/press-releases/2022/OppFi-Reports-Second-Quarter-2022-Financial-Results/default.aspx.

[26] https://s23.q4cdn.com/490591927/files/doc_financials/2022/q2/99.1-06-2022-Earnings-Release-FINAL.pdf.

[27] https://www.af247.com/online-loans/flex-loans-utah/.

[28] https://www.spotloan.com/.

[29] https://www.bigpictureloans.com/loan-rates.

Fourth and finally, the current regulatory regime creates both an unlevel playing field and a significant risk that consumer protection issues affecting vulnerable consumers will go undetected. Banks with assets above $10 billion are, of course, subject to supervision by the CFPB while non-depositories offering the same products – or risky products – are not subject to supervision. That means that the Bureau does not have the same window into the practices of these non-depositories as it has with respect to depositories. The Bureau's current authority with respect to these entities is limited to enforcement and the Bureau has brought only a handful of cases against non-depository lenders other than payday and other small-dollar lenders.

We recognize, of course, that the Bureau recently announced its intent to exercise its authority to engage in risk-based supervision of non-depositories in the absence of a larger participant rule under § 1024(a)(1)(C) of the Dodd-Frank Act. That section requires that each risk-based supervisory exam must be predicated on a company-specific finding, following notice to the company and an opportunity to respond, that the company in question is "engaging, or has engaged, in conduct that poses risk to consumers."[30] Given these procedural and substantive requirements, we believe that although risk-based supervision may be a valuable complement to a larger participant rule – and may even be sufficient in markets where there are only a small number of players – it is not an adequate substitute for a larger participant rule for markets with a substantial number of large participants. That is certainly true with respect to the personal loan market which, according to the 2019 Census of U.S. Businesses, encompasses 2,900 firms engaged in consumer lending of which 61 are large establishments with more than 500 employees and also encompasses at least some portion of the 5,079 firms classified as "credit intermediaries" of which 99 are large establishments.[31]

Further, a larger participant rule, once promulgated, would institutionalize supervision of larger personal loan lenders. This would allow the Bureau's Office of Supervision to schedule examinations of such lenders in the normal course as part of the Bureau's ongoing supervision program rather than depend on individual decisions by whoever is serving as the Bureau's Director at any moment in time.

<u>Defining the Personal Installment Loan Market</u>

A necessary element of a larger participant rule would, of course, be a definition of the relevant market so that the Bureau could draw a line of demarcation for identifying larger participants. We recommend defining the market as follows:

> Originating or servicing closed-end loans or open-end lines of credit payable in more than one installment and extended to consumers for personal, family, or household purposes other than loans secured by real estate, post-secondary education loans as defined in 12 C.F.R. § 1090.106(a), or automobile purchase or refinance loans as defined in 12 C.F.R. § 1090.108(a).

Two aspects of this proposed definition merit brief elaboration.

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[30] 12 U.S.C. § 5512(a)(1)(C).

[31] https://www.census.gov/data/datasets/2019/econ/susb/2019-susb.html (NAICS Codes 522291, 522298).

First, we recommend that the Bureau cover both closed-end installment loans and open-end lines of credit. In truth, the line between these two products is often indistinct: lenders offering what are, in form, closed-end loans typically encourage consumers, as they pay down their loan, to reborrow at least up to the amount of the original loan much like an open-end line of credit while open-end loans can be structured such that each draw is repayable in fixed payments over a fixed term, thereby closely resembling a closed-end loan.[32] Indeed, there is an ongoing debate as to whether BNPL loans are closed-end loans – since each BNPL purchase is repaid on a fixed schedule – or open-end lines of credit since once a consumer opens a BNPL account the consumer typically can (and is encouraged to) make additional BNPL purchases up to a certain (typically unstated) maximum. One of the three national consumer reporting agencies has announced that it will allow BNPL lenders to report their loans either as closed-end or open-end which, the Bureau has noted, may lead to "inconsistent treatment."[33] Grouping closed-end and open-end loans into the definition of a single, personal loan market will avoid any such potential inconsistency with respect to Bureau supervision and avoid potential uncertainty as to the coverage of BNPL loans. Further, such a market definition will assure that for lenders that offer both types of products the Bureau will be able to examine their total business, thereby avoiding the risk of creating incentives for opportunistic behavior.

Second, we recommend defining the market to cover both the originating and servicing of personal loans. This is important because as Deputy Director Martinez recently has observed, a number of "fintechs" have developed what they claim are "bank partnerships" under which the fintechs market, underwrite, and service loans and assume most of the credit risk on such loans by purchasing the receivables but make the loans in the name of the bank partner which retains a small share of the receivables.[34] These lenders assert that because the accounts are technically owned by a bank, the bank is the true lender. Although that claim is certainly debatable, in all events it is clear that the non-bank partner – the fintech – is itself a covered person delivering a consumer financial product or service given its role as the loan servicer. Defining the market to cover servicing as well as origination will assure that these non-depository fintechs, if large enough to meet the larger participant threshold, are subject the Bureau's supervision at least with respect to its servicing activities, including its activities in billing, collecting, and furnishing data to consumer reporting agencies.

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[32] Several credit card issuer afford consumers the option to elect to repay any given purchase on an installment schedule such as My Chase Plan, Citi's Easy Payment Plan, or American Express' Split Purchases. Upgrade, Inc., a non-depository credit card issuer, offers the Upgrade Card which convert monthly purchases into new installment loans.

[33] https://www.consumerfinance.gov/about-us/blog/by-now-pay-later-and-credit-reporting/.

[34] https://www.consumerfinance.gov/about-us/newsroom/deputy-director-zixta-martinezs-keynote-address-at-the-consumer-federation-of-americas-2022-consumer-assembly/.

Conclusion

For the foregoing reasons, we urge the Bureau to move promptly to commence a rulemaking to define larger participants in the market for personal loans.

Respectfully submitted,

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