Center for Responsible Lending
Public Citizen
National Consumer Law Center (on behalf of its low income clients)
Consumer Federation of America
American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
Americans for Financial Reform Education Fund
Leadership Conference on Civil and Human Rights
League of United Latin American Citizens (LULAC)
NAACP
National Association for Latino Community Asset Builders
National Coalition for Asian Pacific American Community Development (National CAPACD)
U.S. PIRG

Comments to the Consumer Financial Protection Bureau
Notice of Proposed Rulemaking
Payday, Vehicle Title, and Certain High-Cost Installment Loans
Proposed Rescission of Ability-to-Repay Rule
12 CFR Part 1041
Docket No. CFPB-2019-0006
RIN 3170-AA80

May 15, 2019

<u>Submitted electronically to https://www.regulations.gov</u>
Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

1. INTRODUCTION AND EXECUTIVE SUMMARY

> *Arthur, a 69-year-old warehouse worker and grandfather of seven, started with a loan of $200 from Advance America. The loan eventually increased to $300. Every payday, rather than defaulting or coming up short on bill money, Arthur went into the Advance America store and paid a fee of $52.50 so Advance America would not deposit his check for the full loan amount. Advance America flipped the loan over a hundred times, until his total interest paid was an estimated $5,000. The clerks knew him by name and often had his paperwork ready for him when he came in.*
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> *Payday lenders have a name for consumers they see every payday: "26ers"—because they pay up every two weeks, 26 times a year. In Arthur's case, they saw him once a month rather than every two weeks, but only because his repayment came from his monthly Social Security check.*[1]

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> *Alicia and Clinton Lummus of Conyers, Georgia, took out a $525 car title loan after injuries forced them both to stop working. Over eight months, they made payments totaling $1,056—more than twice the amount borrowed—but ultimately fell behind on payments. The lender then repossessed the vehicle, worth $14,000—and was able to keep any excess money from the sale of the vehicle, since Georgia law allows the lender to do so.*[2]

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We, the consumer and civil rights groups named above, write to strongly oppose the proposed rescission ("Proposal")[3] of the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") rule to establish ability-to-repay ("ATR") requirements for payday and vehicle title loans ("Ability-to-Repay (ATR) provisions" or "Rule").[4] We urge the Bureau to withdraw this Proposal and ensure on-time implementation of the ATR provisions.[5]

The Bureau spent over five years engaging in extensive information gathering, public input and analysis before finalizing a rule to address the unfair and abusive practice by payday and vehicle title lenders of making loans without considering ability to repay.[6] The Bureau identified that practice as unfair and

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[1] Appendix A, #1. Loan documents and notes from conversation with borrower on file with the Center for Responsible Lending (CRL).

[2] Appendix A, #102. *See S*. Kirchhoff, *Some consumers run into big problems with auto title lending*, USA Today, available at http://usat.ly/124EbDR.

[3] CFPB, Payday, Vehicle Title, and Certain High-Cost Installment Loans, Notice of Proposed Rulemaking, 84 Fed. Reg. 4252 (Feb. 14, 2019) ("Proposal").

[4] CFPB, Payday, Vehicle Title, and Certain High-Cost Installment Loans, Final Rule, 82 Fed. Reg. 54472 (Nov. 17, 2017) ("Final Rule").

[5] Throughout these comments, "Rule" generally refers to the ATR provisions, while, "2017 Rule" refers more broadly to the entire rule, including both the ATR provisions and the payment protections.

[6] The Bureau issued the 2017 Rule primarily pursuant to its authority under section 1031 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act") to identify and prevent unfair, deceptive, or abusive acts or practices. It also used authorities under section 1022 of the Act to prescribe rules

abusive based on an extraordinarily robust record and crafted a Rule that will benefit consumers by reducing the harm that the unfair and abusive practice causes, while preserving access to credit less likely to be harmful.

The Proposal—a plainly outcome-driven, 47-page exercise in grasping for straws—has offered no reasonable basis to rescind that Rule. Based on a distorted focus on the Rule's "dramatic impacts" on lenders' ability to engage in a predatory practice, rather than on the need to protect consumers, the Proposal claims that the evidence must somehow be "more robust." If the Rule requires significant changes for payday and vehicle title lenders, it is because the harm to consumers is dramatic. The Bureau's new approach would ignore its consumer protection mandate and require the agency to hesitate when consumer harm is the most severe.

The Proposal does not dispute the substantial injury to consumers from lenders' practices. But the Bureau repeatedly ignores and minimizes the enormous evidence of that injury, and fails to account for that injury in its analysis. The Proposal prioritizes preserving lenders' revenues over protecting consumers, abandoning its statutory purpose.

The Proposal improperly discounts the extensive research and analysis that supported the Rule and wrongly claims that the Rule's finding rests primarily on two studies, which it then attacks with specious arguments. The Proposal then summarily rejects the alternative of conducting more research to address its purported concern that more evidence is needed—in favor of simply ignoring the undisputed harm to consumers and rescinding the core of the 2017 Rule.

The Proposal falsely claims that the Rule improperly interpreted the standards for unfair and abusive to require that consumers be able to make an individualized, specific projection of their personal risk from lenders' practices. The Proposal then unreasonably narrows the inquiry for unfair and abusive and ignores that the Rule's record satisfies even the proposed new standards.

At every turn, the Proposal is based on speculation, summary and unreasoned rejections of the Rule's findings, and ludicrous counterarguments. The Proposal is arbitrary and capricious and should be withdrawn.

We summarize the sections of our comments below.

Section 2: Lenders take advantage of consumers and harm them by making loans without ability-to-repay determinations; the Bureau crafted a tailored rule that would help consumer by limiting that harm.

The Proposal never disputes the harms of the debt trap. But the Proposal, without basis, would permit those harms to continue. Payday and title lenders' practice of making loans without considering ability to repay causes serious and widespread harm. Payday and vehicle title lenders turn responsible lending on its head, creating a debt trap by design that is the core element of their business model. The overwhelming majority of payday and auto vehicle loans are made to borrowers caught in a debt trap

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and make exemptions from such rules as is necessary and appropriate to carry out the purposes and objectives of the Federal consumer financial laws, as well as section 1024 authority (to facilitate supervision of certain non-bank financial service providers) and section 1032 (to require disclosures). *See* 82 Fed. Reg. at 54472.

because they cannot afford to repay their loans on their initial terms. And the practice of making loans without determining borrowers' ability to repay inflicts multiple kinds of harm on consumers. Consumers are injured by being forced to choose between three options, all harmful: long-term indebtedness without any reduction in principal, delinquency and default, or default avoidance, including foregoing basic living expenses and financial obligations. The injury occurs both from non-bank- and bank-issued payday loans. And lenders' unfair and abusive practice causes particular harm to financially vulnerable communities, including older Americans, those on a fixed income, and communities of color. The Rule is carefully tailored to address these harms while providing several avenues through which payday, vehicle title, and other short-term lending can continue.

Section 3: The Proposal is an unreasoned betrayal of the Bureau's statutory mission.

The Proposal abandons the Bureau's core statutory mission of protecting consumers and shows an almost exclusive focus on the interests of payday and vehicle title lenders. The Proposal couches its concerns as a desire to preserve access to credit, consumer choice and competition, and state authority, and to respond to a distorted notion of the Rule's "dramatic impacts," but none of these rationales stands up:

- The Bureau's mission is not to preserve access to harmful, unaffordable credit, especially when over 80% of covered loans do not meet consumer needs and are made merely to repay a prior unaffordable loan.
- "Innovation" and "competition" have not alleviated the harms in this market; repealing the ability-to-repay protections and giving consumers the "choice" of unaffordable loans will merely abandon guardrails that steer the market and innovation in the right direction.
- If state laws alone adequately protected consumers, Congress would not have created the CFPB; it is the Bureau's duty to create federal consumer protection standards that provide minimum standards for residents across the nation. The Rule will co-exist with state laws.
- In its claim that the Rule should be revisited in light of its purportedly "dramatic impacts," the Proposal turns the Dodd-Frank mandate on its head. By suggesting a Rule with "dramatic impacts" should be held to some invented new standard for evidence, the Proposal would require the Bureau to hesitate before addressing practices that impose the most dramatic and widespread harm on consumers and thus most require significant change.
- The Proposal's claim that making payday and vehicle title loans without ability-to-repay determinations is not unfair and abusive is illogical and unsupported. The Proposal's analysis fails dismally to meet the Proposal's own invented standard for "more robust" evidence for a rule with "dramatic impacts," as it does not present data that support its conclusions. Yet its unjustified applications of these legal standards risk weakening the protections the standards are intended to provide across all consumer financial markets.

Section 4: Making payday and vehicle title loans without ability-to-repay determinations is an unfair practice.

Starting from the flawed premises above, the Proposal embarks on an equally flawed approach to reassessing the unfairness of covered lenders' practice of lending without regard to ability to repay.

The Proposal all but ignores the substantial injury posed by covered lenders' practices, while arguing that the injury is reasonably avoidable. But the severe and widespread injury cannot be ignored, as the pervasiveness of harm is itself powerful evidence that the harm is not "reasonably" avoidable. The

Proposal's theoretical argument has no basis in the real world where consumers, in large numbers, are not in fact avoiding, and cannot reasonably avoid, the harm from a market that is designed to create debt traps.

The Rule also relied on a host of other data that shows that the harms are not reasonably avoidable. This data includes the way the products are structured to encourage a debt trap, various studies and other information about consumers' lack of understanding about the likelihood and extent of the harm they will experience, and the difficulty of avoiding harm once caught in the debt trap. Indeed, once the consumer takes out the first unaffordable loan, the consumer is limited to only harmful options, and harm is not reasonably avoidable.

The Proposal's claim that that Rule's reasonably avoidable analysis rests almost exclusively and improperly on a study by Professor Ronald Mann is absurd and wholly unsupported. That study was only one piece of a powerful record of research and analysis. The Proposal criticizes the study's sample, but offers no analysis suggesting it is not representative—and then decides to use the study when it sees fit. Thus, the Proposal is simply cherry picking the research it does not like, in the instances where it disagrees with its conclusion. The proposal also refuses to do its own research to address whatever deficiencies it claims should be addressed.

The Proposal also mischaracterizes the Rule's legal analysis of the reasonably avoidable standard, and then proposes a purportedly new approach, which it utterly fails to explain or justify. The Rule never came close to saying that borrowers must have a specific understanding of their individualized, personal risks. Rather, it found, based on ample evidence, that for many borrowers, the likelihood and severity of harm were far greater than people had reason to anticipate or the means to avoid. Even applying what appears to be the Proposal's application of the standard, the record supporting the Rule clearly shows that borrowers cannot reasonably avoid the harm from lenders' making loans without ability-to-repay determinations.

The Proposal attempts to anchor its purportedly new standard in Federal Trade Commission ("FTC") and other authority. But it presents a dishonest portrayal of that authority in making the claim that a disclosure about the possibility of harm is enough to show that harm is reasonably avoidable. The Proposal ignores the many unfairness rules that imposed substantive requirements precisely because general disclosures are ineffective.

The Proposal also concludes that the harm consumers experience is outweighed by countervailing benefits. But the Proposal erroneously claims that the Rule's step-down exemption to the ability-to-repay determination should be irrelevant to the assessment of countervailing benefits. This approach ignores the reality of how the Rule remedies the identified unfair practice and weighs the countervailing benefits based on harm against the benefits, including the costs of the actual remedy. Instead, the Proposal assumes a hypothetical, more severe version of the remedy than what was adopted. In analyzing the potential countervailing benefits, the Proposal also ignores the Rule's findings, speculates about unlikely benefits, and overstates the benefits for borrowers caught in long strings of unaffordable loans and borrowers who default. After stretching to find these implausible benefits, the Proposal then fails to weigh those benefits against the severe harm caused by lenders' practices – yet again failing to account for the harm that motivated this Rule.

Finally, the Proposal also ignores the Rule's finding that public policy overwhelmingly supports a finding that it is unfair for payday and vehicle title lenders to make loans without considering ability to repay.

Section 5: Making payday and vehicle title loans without ability-to-repay determinations is an abusive practice.

The Proposal's flawed analysis of unfairness is echoed in its revisionist, cursory and unsupported rejection of the finding that it is an abusive practice for payday and vehicle title lenders to make loans without considering ability to repay.

The Rule was well justified in finding that consumers lack understanding of the material risks and costs of these loans. Looking well beyond the Mann study on which the Proposal fixates, the Rule outlined a host of other evidence and factors to support this finding, including the fact that loans are marketed very differently from the way they perform and that the financial distress and immediate problems consumers face leaves them vulnerable to a short-term focus that impedes their understanding of long-term risks.

The Proposal erroneously claims that the Rule required that people have an understanding of their specific, individualized and personal risks, when instead the Rule found that, in this market as a whole, borrowers do not understand their likelihood of being exposed to significant risks or the severity of resulting costs and harm.

The Proposal fails to proffer more than one conclusory sentence, with no evidence, to explain why it believes that consumer understanding *does* meet the Bureau's new proffered standard that consumers must understand the general risks of harm sufficient for them to consider taking reasonable steps to avoid that harm. To the extent that the Bureau is claiming that consumers merely need understand that loans have risks if not repaid, the Bureau is re-writing the Dodd-Frank Act, which it lacks the authority to do.

The Proposal also fails to rebut the Rule's extensive record showing that consumers are unable to protect their interests in this market. That evidence, from a variety of sources, included the financial vulnerability of payday and vehicle title borrowers; the impact of the mismatch between how loans are marketed and how they perform; the activities of lenders in refusing or actively discouraging prepayments and options to pay down loans over time; the choices—all harmful—that confront a borrower once they are caught in an unaffordable loan; and the evidence that large numbers of consumers are not protecting their interests, including that many borrowers experience extended loan sequences that end in default.

The Proposal instead criticizes one finding from one study by the Pew Charitable Trusts: that many payday borrowers have found themselves in so difficult a situation that they would take out a payday loan on any terms. The Proposal claims without basis that a survey of actual payday borrowers about an actual point in time was only about their abstract feelings, not about an actual borrowing experience. The Proposal also fails to consider doing more research to bolster this point. The Proposal points to the large number of consumers who have trouble paying regular bills as almost a positive thing, inexplicably suggesting this fact shows that people could protect their interests because they were accustomed to exploring alternatives. And it points to the difficult alternatives that cash-strapped consumers use to manage shortfalls when payday loans are not available – or to eventually extract themselves from debt trap loans – to minimize the desperation that makes it hard for people to avoid debt trap loans.

The Proposal also blithely rejects the finding that covered lenders take unreasonable advantage of borrowers. The Proposal claims that lending without considering ability-to-repay is common, not atypical, pointing to loans to those with little to no credit history; student loans; and reverse mortgages. But each of these three markets, unique and different from payday and vehicle title loans in their own way, involves assessments and expectations of ability to repay. The Proposal nonsensically argues that, because loans are made on standard terms to the general public, they do not target or take advantage of the vulnerable borrowers who respond to ads for quick loans to those with bad credit. The finding that lenders take advantage of consumers by marketing loans in a manner very different from the risks and costs they pose does not mean that the Rule required borrowers to understand lenders' business model. And the fact that lenders cannot charge exploitative rates for longer term loans in every state, or that it would be risky to make longer-term loans to people who cannot afford to repay them, does not justify eliminating protections against the debt trap of short-term, balloon payment loans.

Section 6: The Proposal ignores obvious alternatives that would preserve protections.

The Proposal's consideration of alternatives to complete repeal of the ability-to-repay provisions is wholly inadequate. Even if one accepts the Proposal's mistaken view that the support and analysis for the Rule falls short, the Bureau fails to adequately consider alternatives to remedy any shortcomings.

The Proposal claims that "more robust and reliable evidence" is needed to support the Rule, yet blithely dismisses the possibility that the Bureau could seek out that evidence. The Bureau could conduct further research itself, look to own supervisory, complaint, enforcement, or market monitoring data, or ask outside researchers to fill in any gaps.

The Bureau's cursory dismissal of these possibilities as too expensive, complex or time-consuming is absurd and hardly qualifies as consideration of this alternative. The Bureau has a particular responsibility to address harmful practices in the market for payday loans, which is one of the few markets that Congress specifically directed the Bureau to examine without doing a larger participant rule. In light of the ample evidence of harm from payday and vehicle-title loans made without ability-to-repay determinations, if the Proposal claims there are gaps in knowledge to support a rule, the Bureau should fill those gaps rather than throw up its hands and say it cannot do anything at all.

The Bureau also fails to consider the alternative of allowing implementation of the Rule to proceed and then analyzing its impacts. The Dodd-Frank Act requires such a look-back, and the Bureau could assess the impact of the Rule in the real world rather than in theory.

Section 7: The section 1022 analysis exposes the arbitrariness of the Proposal's rescission reasoning but also minimizes its extraordinarily harmful consequences.

The Bureau's analysis of the potential benefits and costs of the Proposal under Section 1022 of the Dodd-Frank Act distorts the Proposal's impacts to attempt to make an extraordinarily harmful proposal appear positive. The Bureau minimizes the harm the Proposal will cause consumers and exaggerates the benefits for industry. Among other problems, the Section 1022 analysis fails to discuss the cost to consumers of strings of unaffordable payments that make it difficult to handle other household expenses and that result in multiple fees several times higher than what borrowers expect to pay. The analysis also minimizes the harmful nature of default by suggesting that the harm is "unclear" and only "perceived."

Section 8: The Proposal suggests a pre-judged result and shortcuts other legal requirements.

Throughout the Proposal, it is crystal clear that the Bureau is aiming for a pre-judged result. That is apparent not only from the Proposal itself but also from the statements and actions of the new Bureau leadership since December 2017.

This bias also leads the Bureau to shortcut other legal requirements. Beyond the fundamental flaws at the core of the Proposal, there are a number of other flaws in the Proposal. The Proposal provides an inadequate description of the relevant market dynamics, especially re-borrowing patterns; of federal laws and regulator guidance, including those that address the harms of payday loans; and of its own consumer complaints. The Paperwork Reduction Act analysis improperly focuses on the information collections associated with the Rule's Payment Protections, which are not at issue in this proposal, rather than focusing on the elimination of the ability-to-repay provisions. The Proposal also evades Regulatory Flexibility Act requirements by inexplicably suggesting that lenders might retain their systems to comply with the ability-to-repay requirements, while the Proposal rests on a conflicting premise: that regulatory action is needed to ensure that lenders can retain current lending patterns.

Section 9: The Rule's Payment Protections are warranted, and the Bureau should ensure on-time implementation.

Although the Bureau has not proposed to change the Rule's Payment Protections, the Proposal notes that it has received requests to do so that it is evaluating. For completeness, we emphasize that the Bureau appropriately has not sought to rescind or change the Payment Provisions and that it should take all action necessary to ensure that they are fully implemented by the August 19, 2019 compliance date.

Consumers suffer significant harm from payday lenders' use of leveraged payment mechanisms. These harms are especially acute in a market plagued with the unfair and abusive practice of making high-cost loans without consideration of ability to repay. The finding of harm is well supported by the Bureau's research and data, supervisory and enforcement experience, reports issued by consumer advocacy or research organizations, and public comments. The limits on payment transfers after two consecutive failures and the required notices are necessary to address the harm from use of leveraged payment mechanisms and to help consumers understand and mitigate the costs and risks of payment attempts. The payment provisions balance protection of consumers and industry rights and are also appropriate from a Paperwork Reduction Act perspective. The attacks on the payment provisions rehash old arguments that the Bureau considered and appropriately rejected when finalizing the Rule.