



BETTER MARKETS

March 18, 2019

Comment Intake
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date, Docket No. CFPB-2019-0007, RIN 3170-AA95, 84 Fed. Reg. 4298 (Feb. 14, 2019)

Dear Consumer Financial Protection Bureau:

Better Markets Inc.¹ appreciates the opportunity to comment on the above-captioned notice of proposed rulemaking (“Delay Proposal” or “Delay Release”), issued by the Consumer Financial Protection Bureau (“CFPB” or “Bureau”). The Delay Proposal would push back for 15 months the compliance deadline currently applicable to the underwriting requirements set forth in the Bureau’s 2017 rule governing payday lenders (“Final Payday Rule”).²

Following an exhaustive rulemaking process that spanned five years, the Bureau concluded in 2017 that millions of Americans living paycheck-to-paycheck needed new protections against unfair and abusive loan practices that were trapping them in interminable cycles of costly short-term debt, consigning them to a virtual debtors’ prison without bars. The result was the Final Payday Rule. A core component of those protections are the underwriting requirements that prohibit lenders from making short-term loans without first reasonably determining that consumers

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans’ jobs, savings, retirements, and more.

² Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472 (Nov. 17, 2017).

have the ability to repay the loans according to their terms. The Bureau further determined in the Final Payday Rule that a compliance deadline of August 19, 2019 was necessary and appropriate to ensure that borrowers could begin receiving the benefits of those underwriting requirements as soon as reasonably possible, while also ensuring that lenders had ample time (nearly two years) to prepare to implement the rule.

Now, a year and a half after the Final Payday Rule was finalized, the Bureau is attempting to push back that compliance deadline for more than an additional year, based on the speculation that the underwriting requirements may be rescinded altogether pursuant to a separate rule proposal (“Rescission Proposal” or “Rescission Release”) and that payday lenders should be spared the potentially unnecessary costs of preparing to comply with requirements that may or may not go into effect. Specifically, the Bureau seeks to protect the payday loan industry from compliance costs and revenue losses that would be unnecessary **if** the underwriting requirements were to be ultimately rescinded.³ In addition, the Release claims that unspecified “outreach to affected entities” suggests that the industry needs significantly **more** than the originally allotted time (almost two years) to comply with new state restrictions on payday lenders as well as the Bureau’s Final Payday Rule.⁴

However, the Bureau’s dramatic shift in position on the compliance deadline cannot be justified under the bedrock principles that limit an agency’s ability to alter its previously adopted rules without a good reason and a detailed explanation. Here, the Bureau fails those tests. It impermissibly caters to the industry by placing controlling weight on highly speculative, self-serving claims and vaguely identified potential costs to payday lenders, while virtually ignoring the enormous harm that borrowers are likely to suffer if the underwriting standards are delayed for yet another 15 months beyond the already generous compliance deadline the Bureau originally established.

In addition, the postponement is indefensible because it depends for its validity on the deeply flawed proposal to rescind the underwriting standards entirely. That proposal is also a striking example of arbitrary and capricious rulemaking: There, the Bureau concedes that it has no idea whether or not the findings that originally supported the underwriting standards are actually valid, yet it leaps to the non-sequitur that those underwriting standards should nevertheless be thrown out. Moreover, recent reports reveal that the Rescission Proposal has been inappropriately influenced through secret meetings with the payday lending industry—meetings that the CFPB attempted to cover up. In addition, it now appears clear that the rulemaking record includes reports paid for and effectively written by the payday lending industry but portrayed as valid, credible, and independent academic studies. Postponing the compliance deadline for a long-considered, well-crafted, and thoroughly-vetted rule on the basis of such a hypothetical,

³ Release at 4299.

⁴ *Id.*

misconceived, and even contaminated de-regulatory proposal would be arbitrary and capricious. For all of the foregoing reasons, the Bureau should abandon the Delay Proposal.

I. The Bureau has failed to justify its attempt to change the compliance date for the underwriting standards.

In the Delay Proposal, the Bureau has failed to provide a sufficiently detailed, credible, and compelling justification for its change of course with respect to the compliance deadline. In its effort to justify the delay, it has over-weighted the concerns and preferences of the payday lending industry while under-weighting the substantial harm to consumers that will arise from the delay.

The law clearly provides that when an agency departs from a prior position, it must “display awareness that it *is* changing position” and “must show that there are good reasons for the new policy.”⁵ Moreover, when a “new policy rests upon factual findings that contradict those which underlay [an agency’s] prior policy,” the agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate.”⁶ This is because, when changing policies, “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁷ This requirement is all the more important where, as here, the agency seeks to change a policy that was adopted relatively recently and only after a lengthy and exceptionally thorough rulemaking process, involving years of empirical analysis and a mountain of evidence.

More generally, when undertaking **any** action, an agency must always “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”⁸ Conversely, the agency may not rely on factors “which Congress has not intended it to consider.”⁹ And agency actions that are based too heavily on speculation rather than evidence are likely to be deemed arbitrary and capricious.¹⁰ The Proposed Delay violates these principles, as the Bureau has, for numerous reasons, failed to justify its decision to change course and delay the underwriting compliance deadline for over a year.

The starting point for any analysis of the Delay Proposal is the robust rulemaking record that the Bureau compiled to support the Final Payday Rule. In 2017, the Bureau determined that the Final Payday Rule, including the underwriting standards and the accompanying compliance deadline, were necessary to protect millions of borrowers of limited means from being trapped in

⁵ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in original).

⁶ *Id.*

⁷ *Id.*

⁸ *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856, 2866 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

⁹ *See State Farm*, 103 S. Ct. at 2867 (a rule is arbitrary and capricious if the agency has “relied” on factors that Congress did not intend).

¹⁰ *Sorenson Commc’ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014).

an endless cycle of costly predatory lending. This conclusion was based on an extraordinarily exhaustive rulemaking that included outreach to industry and consumer groups, public field hearings, inter-agency consultation, supervisory exams, market surveillance, enforcement actions, research and analysis set forth in white papers, analysis of consumer complaint information, and even consumer testing of disclosure elements. The process spanned five years and generated intense public interest, including 1.4 million comments from a wide variety of stakeholders, all of which the Bureau took into account. In the 450-page Federal Register release for the Final Rule, the Bureau drew on this extensive rulemaking record in concluding that the underwriting provisions would significantly reduce consumer harm and that the current compliance deadline of August 19, 2019 was necessary and appropriate to protect consumers and provide the industry ample time to comply.

In the face of this extensive rulemaking record, the Bureau now attempts to justify its change in position on the basis of anecdotal input from unidentified members of the industry who harbor concerns about vaguely defined compliance costs, revenue losses, and implementation challenges. For example, the Bureau states that it “is aware that some small lenders believe that the impacts of the [underwriting requirement] would significantly reduce the amount of revenue generated from their lending operations.”¹¹ Elsewhere the Release states that if the compliance deadline is not extended, “firms could experience substantial revenue disruptions that could impact their ability to stay in business.”¹²

As to compliance challenges, the Bureau notes that it has “discussed implementation efforts with a number of industry participants . . . and through these conversations the Bureau has become aware of various unanticipated potential obstacles to compliance” with the rule by August 19, 2019.¹³ The Bureau then cites as an example that several states have recently passed laws related to payday lending and other covered short-term loans, and that “[s]ome industry participants have told the Bureau that they are prioritizing developing compliance management systems in response to these laws.”¹⁴ However, nowhere does the Bureau explain why it would be appropriate for a regulated industry—or the agency overseeing that industry—to subordinate federal requirements to state regulations. Nor does the Bureau demonstrate or even discuss specifically how these state laws interact with the Final Rule in such a way as to require further delay of the compliance date. Indeed, the Proposal is littered with vague assertions that accept industry’s unsupported concerns at face value—precisely the sort of unsubstantiated predictions that courts find unpersuasive.¹⁵

¹¹ Release at 4300.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See *Council of Parent Attorneys & Advocates, Inc. v. DeVos*, No. 18-CV-1636 (TSC), 2019 WL 1082162 (D.D.C. Mar. 7, 2019) (rejecting delay in a special education rule in part because concerns cited in support of the delay were “drenched” in qualification and speculation).

An even more fundamental defect in the Delay Proposal is the Bureau’s misplaced desire to protect payday lenders and their revenues at the expense of consumers. Serving the interests of the predatory financial services industries is not the Bureau’s mission, and, unsurprisingly, such a perverse goal is found nowhere in the list of factors that the Dodd-Frank Act requires the Bureau to consider in its rulemakings.¹⁶ The agency’s contrived attempt to recast its solicitude for payday lenders as preserving “competition” within the meaning of the Dodd-Frank Act simply fails on its face: The Final Payday Rule explained at length why the underwriting standards were perfectly consistent with preserving competition, even though they were expected to affect the revenues of payday lenders and even limit the ability of some to remain in business.¹⁷

At the same time, the Delay Release pays little heed to enormous countervailing harm that a 15-month compliance delay will inflict on consumers. While the Delay Proposal makes passing mention of some potential costs to consumers arising from the compliance delay,¹⁸ it minimizes those costs. Moreover, nowhere does it seek to balance that harm against the vague and speculative impact on payday lenders.

After side-stepping the prodigious harm that a delay would inflict on consumers, the Delay Release brazenly claims that the delay would actually benefit consumers by limiting industry disruption and preserving “consumer access to credit.”¹⁹ In reality, under-regulated and toxic financial products do not benefit financially desperate consumers—any more than poison benefits those who are starving. More to the point, the notion that consumers overall would be harmed by the implementation of the underwriting requirements in the Final Payday Rule is, of course, the exact opposite of the conclusion the Bureau reached when it promulgated the rule in 2017. Indeed, the Bureau previously acknowledged that some consumers might have reduced access to credit as a result of the Final Payday Rule, but ultimately concluded that the benefits to consumers in general would be far greater: Avoiding loans that consumers cannot afford to repay at inception and the endless debt cycle that follows were deemed to substantially outweigh any harm from any reduction in access to unaffordable predatory loans.²⁰

On what basis does the Bureau now come to the opposite Orwellian conclusion that delaying the compliance date for the underwriting provisions of the Final Rule would confer a net benefit on consumers? An answer—if there is one—is nowhere to be found in the Proposal. Delaying the compliance date on the basis of such a meager record would be arbitrary and capricious.

¹⁶ See *State Farm*, 103 S. Ct. at 2867 (a rule is arbitrary and capricious if the agency has “relied” on factors that Congress did not intend).

¹⁷ See, e.g., Final Payday Rule at 54,602.

¹⁸ Release at 4309.

¹⁹ Release at 4300.

²⁰ Final Payday Rule at 54,834 – 54,846.

II. The proposed compliance delay hinges on the proposal to rescind the underwriting standards, which is in turn arbitrary and capricious.

The Delay Proposal assumes the validity and ultimate implementation of the Rescission Proposal. According to the Release, industry compliance with the underwriting standards will be unnecessary **if** the underwriting standards are in fact repealed. But the Bureau is not entitled to make that assumption, especially given the glaring flaws in the Rescission Proposal. By analogy to a petition for a stay of an effective date under Section 705 of the Administrative Procedure Act pending judicial review, the Bureau cannot demonstrate the likelihood of success on the merits. Acting on the basis of such a flawed assumption is in fact a cardinal example of arbitrary and capricious rulemaking, one that is unlikely to survive judicial review.

The Rescission Proposal comes nowhere close to providing the compelling factual and legal analysis that would be necessary to cast serious doubt on the underwriting standards that were thoroughly vetted and finalized in 2017. First, it is devoted primarily to quarreling with the Bureau's original interpretation of two studies underlying the final rule (the Mann study and the Pew study), items cherry-picked from a vast body of material that the Bureau compiled during the original rulemaking. Setting aside the agency's new-found interpretation of those studies—of dubious merit at best—the Release provides no alternative substantive analysis whatsoever regarding the findings that the agency now believes were insufficiently supported. The Rescission Release contains this astonishing admission:

The Bureau also preliminarily believes that it cannot, in a timely and cost-effective manner for itself and for lenders and borrowers, develop evidence **that might or might not** corroborate the Mann Study results that the Bureau relied upon to support the key findings the Bureau set forth in the 2017 Final Rule.²¹

The Rescission Release repeats this revelation multiple times, again and again conceding that the agency has nothing to offer in the way of substantive analysis regarding whether or not the earlier findings are actually valid, yet nonetheless jumps to the irrational conclusion that the underwriting standards should be repealed. Specifically, with respect to the Pew study, the release observes that:

[A]s with the Mann Study, as discussed above, the Bureau preliminarily believes that it cannot, in a timely and cost-effective manner for itself and for lenders and borrowers, develop sufficiently robust and reliable evidence **that might or might not corroborate** the Pew Study results.²²

²¹ Rescission Proposal at 4266 (emphasis added).

²² Rescission Release at 4268 (emphasis added).

And the summary section states unabashedly that:

The Bureau is not aware of any additional evidence that would provide the support needed for the key findings that are essential to such a determination and does not believe it is cost-effective for itself and for lenders and borrowers to conduct the necessary research to try to develop those key findings. The Bureau is therefore proposing to rescind those identifications.²³

In essence, the Bureau is questioning the validity of a few findings underlying the Final Payday Rule, which was based on years of research, analysis, and deliberation, while at the same time conceding that those findings may in fact be proven entirely valid if more research and analysis were to be conducted. It is arbitrary and capricious for an agency to throw up its hands and admit ignorance about the foundation for an existing rule yet nevertheless conclude that the rule should be rescinded, simply because the agency is unwilling to do the work.

It gets even worse. The Rescission Proposal not only lacks support but also apparently rests on biased and contaminated input—a rulemaking foundation that is worse than nothing at all. Recent reporting has revealed, for example, that the CFPB’s decision to scale back the Final Rule was influenced by secret meetings between the payday lending industry (directly or through its lobbyists and representatives) and the CFPB.²⁴ The existence of these meetings, confirmed by an industry participant, contradicts statements by the CFPB that it did not meet with the industry prior to issuing the Rescission Proposal.²⁵

Why would the CFPB falsely deny meeting with the payday lending industry before proposing to delay and then rescind a rule that the payday lending industry opposes? Because it would confirm that the CFPB was adopting that industry’s proposals regardless of merit, deliberation, or basis.

²³ Rescission Release at 4253 (emphasis added).

²⁴ See Kevin Dugan, *CFPB Spoke With Industry Execs Before Relaxing Payday Loan Rules*, N.Y. POST (Feb. 27, 2019), <https://nypost.com/2019/02/27/cfpb-spoke-with-industry-execs-before-relaxing-payday-loan-rules/>; see also, Dennis Kelleher, Opinion, Keep Industry Insiders Out of the Payday Loan Rulemaking Process, THE HILL (Mar. 11, 2019), <https://thehill.com/opinion/finance/433426-keep-industry-insiders-out-of-the-payday-loan-regulatory-process>.

²⁵ Kevin Dugan, *CFPB Spoke With Industry Execs Before Relaxing Payday Loan Rules*, N.Y. POST (Feb. 27, 2019), <https://nypost.com/2019/02/27/cfpb-spoke-with-industry-execs-before-relaxing-payday-loan-rules/>. According to the report, when asked about the contradiction the CFPB spokesperson requested speaking with the reporter off the record. When the reporter refused, the CFPB spokesperson stopped responding to requests. *Id.*

Moreover, recent reports have also revealed the extent to which the payday lending industry has shaped purportedly independent academic studies supporting the positions of the payday lending industry. For example, one recent report revealed that Ronald Mann, a Columbia Law School professor who penned an influential study (which was funded by the payday lending industry), had extraordinarily close ties with an industry group of payday lending lawyers and advised them on how to present data when urging policymakers to deregulate their industry.²⁶ These previously undisclosed ties likely reveal why Professor Mann desperately tried to frame his results as favoring the industry, even though the data demonstrated substantial consumer harm and confusion associated with payday loans.²⁷ In an even more egregious example, another academic study on payday lending was not only requested and funded by the industry but also apparently largely shaped by a particularly zealous advocate for the payday lending industry.²⁸

Given how extraordinarily difficult it is to unearth and expose such carefully concealed corruption of academics and the rulemaking process, one can only assume that these two industry-influenced studies are only the tip of the iceberg. Many more examples of similarly corrupted “academic studies” on which the CFPB is relying undoubtedly exist. The CFPB should promptly conduct a thorough investigation of all pro-industry studies reviewed or relied on in connection with the Delay Proposal and the Rescission Proposal and ascertain if there has been any industry influence associated with such purportedly independent work. To the extent that the CFPB is attempting to support its Rescission Proposal on the basis of these and other industry talking points laundered through supposedly independent studies, it lacks a reliable and credible foundation.

CONCLUSION

In summary, the Delay Proposal on its face lacks a sufficiently detailed and persuasive justification for such a significant change in the compliance deadline for the underwriting standards. In addition, it rests on the outcome of a related but hopelessly flawed Rescission Proposal that by its own admission lacks a substantive foundation—and worse yet, appears to rest in some measure on covert industry lobbying.

²⁶ Kevin Dugan, *Columbia Prof’s Ties to Payday Lenders Cloud CFPB Rollback*, N.Y. POST (Jan. 31, 2019), <https://nypost.com/2019/01/31/columbia-professors-murky-ties-could-compromise-cfpb-rollout/>.

²⁷ Professor Mann’s study, as the CFPB noted in 2017, demonstrated that a significant percentage of consumers—nearly half—who took out payday loans underestimated how long they would be in debt. Final Payday Rule at 54,569. Notwithstanding Professor Mann’s attempt to spin the results of his study, the CFPB reasonably interpreted this data to indicate widespread misunderstanding by consumers about the impact of taking out payday loans (after all, it is highly unlikely that nearly half of consumers who take out 3 year car loans significantly underestimate how long it will take to pay back those loans). *Id.* at 54,472; 54,569.

²⁸ Renae Marle, *How a Payday Lending Industry Insider Titled Academic Research In Its Favor*, WASH. POST (Feb. 25, 2019), https://www.washingtonpost.com/business/2019/02/25/how-payday-lending-industry-insider-tilted-academic-research-its-favor/?utm_term=.7cee8ee8d01e.

We hope these comments are helpful as you evaluate the Delay Proposal.

Sincerely,



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