May 1, 2019

CFPB Shifts Direction—Implications of Proposed Rescission of Portions of Payday Lending Regulation

CFPB Preliminarily Concludes That the 2017 Final Rule Lacked a Sufficiently Robust Factual Basis Given the Impact on the Industry, and Preliminarily Rejects Prior Legal Analysis of Unfair and Abusive Practices Supporting Rule Provisions

SUMMARY

The Consumer Financial Protection Bureau (the "CFPB" or the "Bureau") is currently seeking comments on a notice of proposed rulemaking that would rescind the 2017 Payday Lending Rule's (the "2017 Final Rule") ability-to-repay provisions (the so-called "Mandatory Underwriting Provisions") in their entirety. The proposal[1] (the "Proposed Rescission") "suggests there was insufficient evidence and legal support" for these provisions. Specifically, the CFPB preliminarily disavows the reliance on certain studies used to support the 2017 Final Rule, and preliminarily concludes that the legal analyses finding unfair and abusive practices were faulty, even if the cited studies had been more robust. The CFPB expresses concern, moreover, that "the [mandatory underwriting] provisions would reduce access to credit and competition in states that have determined that it is in their residents' interests to be able to use such products, subject to state-law limitations." The CFPB's release also suggests that the CFPB is not considering replacing the mandatory underwriting provisions with other remedies, such as enhanced disclosures. The Notice of Proposed Rulemaking was originally issued on February 6, 2019, and comments are due May 15, 2019.

The Proposed Rescission would not modify the "payment provisions" of the 2017 Final Rule. However, the CFPB signaled that it would be "examin[ing] ... issues" as a result of compliance concerns that had come to the CFPB's attention. The CFPB also issued notice of a second proposal that would delay the

August 19, 2019 "compliance date for the mandatory underwriting provisions of the 2017 final rule" to November 19, 2020. That proposal had a 30-day comment period, which closed on March 18, 2019.[2]

While the Proposed Rescission is concerned with payday and vehicle-title loans, we believe it is worth considering the broader implications of the proposal and its factual, legal and policy analyses for the CFPB's current approach to consumer financial protection. Should these analyses be adopted in other contexts, the CFPB's regulatory and enforcement efforts may focus more heavily on plain-vanilla deceptive practices theories, instead of on the more far-reaching and potentially intrusive unfairness and abusiveness doctrines.

BACKGROUND

On October 5, 2017, the Bureau issued the 2017 Final Rule.[3] On January 16, 2018, the Bureau, under new leadership, announced that it would be reconsidering the rule.[4] On April 9, 2018, trade associations challenged the 2017 Final Rule in a lawsuit filed in the Western District of Texas.[5] The court issued an order on November 6, 2018, staying the August 19, 2019 compliance date of the 2017 Final Rule pending further court order.

The Mandatory Underwriting Provisions of the 2017 Final Rule focused principally on "payday loans," which are short-term loans required to be repaid in a lump sum single payment upon receipt of the borrower's next income payment, and short-term vehicle-title loans, which are secured by the borrower's vehicle and almost always are due in a lump sum single payment, typically within 30 days after the loan is made. Some longer-term balloon payment loans were also included.

The 2017 Final Rule contained two distinct sets of provisions. The first set of provisions, the so-called "Mandatory Underwriting Provisions," concern the underwriting, recordkeeping and reporting of covered short-term and longer-term balloon payment loans, including payday and vehicle-title loans. These provisions were designed to put the onus on lenders to determine whether the consumer had the "ability to repay" the requested loan and to inhibit borrowers who did not have the "ability to repay" from taking out and then renewing payday and vehicle-title loans. The second set of provisions, the "Payment Provisions," are applicable to the same set of loans and also to certain high-cost installment loans. They establish limitations with respect to attempts to withdraw payments on the loans from consumers' checking or other accounts.[6]

THE CFPB'S PROPOSED RESCISSION AND NOTICE OF PROPOSED RULEMAKING

Summary of Key Aspects of the Proposed Rescission

The Proposed Rescission would eliminate the Mandatory Underwriting Provisions from the 2017 Final Rule, specifically: (1) the "identification" provision which would prohibit lenders from making covered loans without reasonably determining that consumers will have the ability to repay the loans; (2) the

"prevention" provision, which would establish specific underwriting criteria; (3) a "conditional exemption" from the ability to repay underwriting requirements for an initial payday loan of up to $500, but only if followed by subsequent loans that "step down" the outstanding principal if the consumer could not repay initially; (4) the "furnishing" provisions which would require reporting information regarding such loans to a central repository so that consumers could not take out numerous covered loans within a short time frame from multiple lenders; and (5) related recordkeeping provisions.

Section 1031(c)(1)(A) of Dodd-Frank gives the CFPB the authority to declare an act or practice "unfair" if the CFPB has a reasonable basis to conclude that the act or practice "causes or is likely to cause substantial injury which is not reasonably avoidable by consumers" and that "such substantial injury is not outweighed by countervailing benefits to consumers or to competition."[7]

Section 1031(d)(2) of Dodd-Frank permits the CFPB to declare an act or practice "abusive" if the act or practice "takes unreasonable advantage" of either (A) "a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service"; or (B) "the inability of the consumer to protect [his or her] interests … in selecting or using a consumer financial product or service."

A. RATIONALES FOR THE 2017 FINAL RULE

In issuing the 2017 Final Rule, the CFPB had concluded that there is *consumer harm* from payday and vehicle-title lending practices:

> … because many consumers struggle to repay unaffordable loans and in doing so suffer a variety of adverse consequences. In particular, many consumers who take out these loans appear to lack the ability to repay them and face one of three options when an unaffordable loan payment is due: Take out additional covered loans (''reborrow''), default on the covered loan, or make the payment on the covered loan and fail to meet basic living expenses or other major financial obligations. As a result of these dynamics, a substantial population of consumers ends up in extended loan sequences of unaffordable loans.[8]

The CFPB went on to find that this substantial injury was not reasonably avoidable by consumers, because "many consumers do not understand or perceive the probability that certain harms will occur"[9] and that therefore "after entering into the loan, consumers do not have the practical means to avoid the injuries that result from being unable to repay it."[10] The CFPB based these findings on its interpretation from a study by Professor Ronald Mann (the "Mann Study" [11]), which compared consumers' predictions when taking out a payday loan about how long they would be in debt with administrative data from lenders showing the actual time consumers were in debt. The CFPB also relied on marketing and servicing practices of providers of short-term loans and its own expertise and experience in the lending practice.[12] The Mann Study was also used to reach the separate conclusion that it was abusive for lenders to make covered loans to consumers who lacked sufficient understanding of the consequences to their individual financial situations by taking out a payday or vehicle-title loan.

When the CFPB made the initial proposal that led to the 2017 Final Rule, it concluded that there were insufficient *countervailing benefits* from the practice found to be unfair—permitting payday and vehicle-title lenders to make loans without considering the ability to repay—to outweigh the consumer harm. The CFPB recognized that some borrowers would in fact be able to repay such loans on time, but might not be able to satisfy an ability to repay underwriting requirement. These consumers, therefore, would be deprived of credit that they could in fact manage. The CFPB believed, however, that this population would be small, and the corresponding countervailing benefit would not be substantial.[13] In the 2017 Final Rule, the CFPB reaffirmed that conclusion, but went on to state that changes that it had made in the regulation between the proposed rule and the 2017 Final Rule simplified the underwriting process and also created the exemption that would permit initial payday loans without requiring detailed underwriting. These modifications would further reduce the incidence of the regulation preventing some consumers from receiving credit that they could in fact repay as agreed. The Bureau also recognized that there was a benefit in convenience to consumers who were able to obtain these loans quickly without a detailed application, credit check and underwriting process. However, in the 2017 Final Rule, the CFPB opined that these indirect benefits of non-underwritten loans were insufficient to outweigh the harm caused by loans made to consumers who could not make a timely repayment.[14]

With respect to an alternative "abusiveness" finding that consumers were unable to protect themselves, the 2017 Final Rule concluded that a Pew Charitable Trusts study[15] (the "Pew Study") demonstrated that more than a third of payday borrowers were in such financial distress at some point in their lives that they would accept a loan "on any terms offered," indicating that they had no alternatives. In essence, the Mandatory Underwriting provisions in the 2017 Final Rule were based on the conclusion that payday and vehicle-title lenders took unreasonable advantage of many financially vulnerable consumers.

The 2017 Final Rule also surveyed state regulation of payday and vehicle-title lending, noting that seventeen states prohibit payday and vehicle-title lending, and many others have detailed regulations, including some that require lenders to consider the borrower's ability to repay or otherwise limit reborrowing.[16] The 2017 Final Rule also observed a trend by states to restrict or prohibit payday lending.[17] However, the CFPB concluded in the 2017 Final Rule that federal intervention was warranted because "the regulatory frameworks in most States that allow and regulate payday, title, and other covered short-term loans do not appear to have had a significant impact on reducing the amounts of default, delinquency, reborrowing, and the other collateral harms from making unaffordable payments that confront consumers of these loans."[18]

B. RATIONALES FOR THE PROPOSED RESCISSION

In the Proposed Rescission, the CFPB relied on the same rulemaking record that supported the 2017 Final Rule, but drew different factual inferences, reached different legal conclusions, and emphasized different policies than were set forth in the 2017 Final Rule. The Proposed Rescission stressed that "it is prudent as a policy matter to require a more robust and reliable evidentiary basis to support key findings

in a rule that would eliminate most covered short-term and longer-term balloon payment loans and providers from the marketplace."[19] The CFPB had estimated in the 2017 Final Rule that the Mandatory Underwriting Provisions would result in a large (55 to 62 percent) contraction of the storefront payday industry and the virtual elimination of the single-payment vehicle-title industry.[20] The Proposed Rescission finds that "if a rule could have such dramatic impacts on consumer choice and access to credit," it would be reasonable under Dodd-Frank to have "robust and reliable" evidence to support the key finding that consumers cannot reasonably avoid that injury.[21]

1. Re-Assessment of Factual Basis for Mandatory Underwriting Provisions

The CFPB has now preliminarily concluded that the limited data from the Mann Study was not "sufficiently robust and representative,"[22] and the Pew Study was not "sufficiently robust and reliable"[23] for the key factual findings that consumers lack the understanding or ability to protect themselves from the potential disadvantages of the payday and vehicle-title loans.[24] Further, in the Proposed Rescission, the CFPB states that it "cannot, in a timely and cost-effective manner," develop evidence that might or might not corroborate either study's results.[25] Consequently, the CFPB concludes that these weaknesses in the evidentiary record alone are sufficient enough to warrant rescinding the Mandatory Underwriting Provisions.[26]

2. Re-Assessment of Legal Analysis of Unfair and Abusive Practices

The Proposed Rescission goes on to state that, even if the evidence on which the 2017 Final Rule was based had been sufficiently robust and reliable—that is, that there was sufficient proof of substantial consumer injury and that payday and vehicle-title lending consumers could not accurately judge their individual ability to repay—the lenders' practices were not unfair and abusive. In the Proposed Rescission, the CFPB criticizes the 2017 Final Rule because the CFPB had used at that time "problematic approaches" in applying the relevant standards to justify the Mandatory Underwriting Provisions.[27]

a. Unfair Practices

The Proposed Rescission asserts that the CFPB now has a "better approach" to applying the reasonably avoidable standard, even assuming that there has been consumer harm. The CFPB concludes in its Proposed Rescission that consumers "need not have a specific understanding of their individualized likelihood and magnitude of harm" such that they could accurately predict how long they would be in debt after taking out a payday or other balloon payment loan for the injury to be reasonably avoidable.[28] The CFPB states that it has "not identified relevant precedent," suggesting that consumers would need to accurately predict their individual prospects for repaying loans as agreed.[29] The Proposed Rescission also asserts that requiring consumers to understand their individualized likelihood and magnitude of harm deters lenders from offering these loans, which suppresses rather than facilitates consumer choice. Rather, a disclosure that "generally alerts" consumers to the likelihood and magnitude of harm "generally

has been sufficient" to avoid a finding that consumers did not appreciate the value of taking steps to avoid that harm.[30] Specifically, the CFPB observes that consumers "need only understand that a significant portion of payday borrowers experience difficulty repaying and often result in extended loan sequences, default, or struggle to pay other bills after repaying their payday loan."[31] The Proposed Rescission preliminarily concludes that this approach is the "best interpretation" of whether substantial injury in this case is reasonably avoidable as a legal and policy matter, thereby precluding an unfairness finding under the Consumer Financial Protection Act.[32]

In the Proposed Rescission, the CFPB has reached a preliminary conclusion that consumers must already be aware of the fact that payday and vehicle-title loans can result in extended reborrowing with attendant fees, while also acknowledging that a study of State-mandated payday loan disclosures found that such disclosures had only a "limited impact" on reducing payday loan use and reborrowing in particular.[33] The Proposed Rescission, nevertheless, requests comment about the types or sources of information with respect to consumer understanding about covered short-term and longer-term balloon payment loans.

The Proposed Rescission also reached a different result than the 2017 Final Rule in assessing whether payday and vehicle-title lending practices produce "countervailing benefits" that outweigh substantial consumer injury. Specifically, the CFPB now believes preliminarily that the benefits to consumers and competition from increased availability of short-term small dollar credit resulting from the lack of "ability to repay" underwriting outweigh consumer injury caused from reborrowing and defaults.[34] The 2017 Final Rule, in coming to the opposite conclusion, took into account that the negative impact on credit availability from the Mandatory Underwriting requirement would be mitigated by the expected use by lenders of the "conditional exemption." This exemption would permit smaller payday loans to be made without satisfying the ability to repay tests, as long as there was a "step down" of principal on subsequent loans if the first one was not repaid on time. The Proposed Rescission criticizes this approach as "putt[ing] the proverbial cart before the horse" because it focuses on the cost-benefit impact of the *regulation*, rather than the costs and benefits of the underlying current lending practice.[35] The Proposed Rescission then states that the 2017 Final Rule both over-relied on the principal step-down exemption and undervalued other benefits to consumers and competition.

Both the 2017 Final Rule and the Proposed Rescission separately analyze the "countervailing benefits" of the challenged lending practices (i.e., making loans without determining an ability to repay) for three groups of consumers: borrowers who repay the initial loan as agreed; reborrowers who incur additional fees as a result of being unable to pay off the loan initially, but do ultimately repay; and borrowers who eventually default. The Proposed Rescission finds that the 2017 Final Rule understated the risk that some consumers who would repay as agreed would nonetheless be denied a loan, in part because some lenders may choose to "over-comply" in order to reduce their legal exposure.[36] The Proposed Rescission similarly finds that substantial countervailing benefits for reborrowers arise from the identified lending

practice, and that these benefits were discounted by the 2017 Final Rule relying on the principal step-down exemption. The Proposed Rescission also observes that the 2017 Final Rule may have minimized the value of short-term loans to consumers who subsequently default because consumers would rather owe a payday lender than obtain funds from other parties. In sum, the CFPB concludes that the 2017 Final Rule underestimated the countervailing benefits of payday and vehicle-title loans to repayers, reborrowers and defaulters, alike.

As to competition, the Proposed Rescission asserts that the 2017 Final Rule understated the impact on competition of the challenged practice. The 2017 Final Rule had assessed the overall impact on competition, not of the challenged practice in the abstract, but of the implementation of the Mandatory Underwriting Provision requirements as a whole. With this analytical approach, the 2017 Final Rule predicted that consolidation in the payday lending industry and reduction in access to credit would be modest, just as it had with respect to the countervailing benefits analysis. This conclusion was based on the availability of the "step-down" exemption, which would permit some lending to proceed without an ability to repay determination. The Proposed Rescission again rejected this approach. Instead, the Proposed Rescission asserts that the analysis should be only of the effect on competition of the challenged practice itself (that issuing payday and vehicle-title loans without an ability to repay determination is an unfair practice) without consideration of how the resulting regulatory provisions would affect competition going forward. Using this analysis, the Proposed Rescission concludes that lenders would not be able to make "upwards of 90 percent of the loans."[37] In short, the revised CFPB view is that the potential impact of the step-down exemption should not have been considered in assessing the effect on competition.

b. Abusive Practices

The Proposed Rescission criticizes the approach taken in the 2017 Final Rule that analyzed whether there were abusive practices, and now instead suggests an approach under which "lack of understanding" would not require payday borrowers to have a specific understanding of their personal risks in taking out the loans.[38] The CFPB's new approach is that consumers have a "sufficient understanding" under § 1031(d)(2)(A) of Dodd-Frank if they appreciate the "general risks of harm" associated with the relevant loans.[39]

The Proposed Rescission preliminarily finds faulty the 2017 Final Rule's approach, which found that payday and vehicle-title lending practices took "unreasonable advantage" of consumers. The 2017 Final Rule laid out a multi-factor analysis, which found that "[a]t a minimum lenders take unreasonable advantage of borrowers when they [1] develop lending practices that are atypical in the broader consumer financial marketplace, [2] take advantage of particular consumer vulnerabilities, [3] rely on a business model that is directly inconsistent with the manner in which the product is marketed to consumers, and [4] eliminate or sharply limit feasible conditions on the offering of the product (such as underwriting and amortization, for example) that would reduce or mitigate harm for a substantial population of

consumers."[40] The Proposed Rescission preliminarily concludes that these factors "do not constitute unreasonable advantage-taking."[41]

As to the first factor, the Proposed Rescission disagrees that "atypicality" is inherently suggestive of unreasonable advantage-taking, because reliance on that factor would "risk stifling innovation."[42] For the second factor, the Proposed Rescission critiques the use of the evidence from the Mann Study and the Pew Study and finds that, even if these studies did show borrower vulnerability, they would not "independently support" an unreasonable advantage-taking determination.[43] The Proposed Rescission critiques the third factor as inappropriately conflating "whether or not consumers understand the lender's revenue structure" with consumers' understanding about the features of the loan itself. The Proposed Rescission did note that the two concepts are connected, but nevertheless "doubts that an inconsistency between a company's business model and its marketing" is a "pertinent factor" in assessing unreasonable advantage-taking.[44] Finally, the Proposed Rescission observes that the fourth factor is not of "significant probative value" because a lender's decision not to offer a short-term balloon payment product may be reasonable.[45]

The CFPB is seeking comment on how it should interpret "taking unreasonable advantage" and the appropriate test for distinguishing between reasonable and unreasonable conduct under § 1031(d)(2)(A) of Dodd-Frank.[46]

3. Re-Assessment of the Impact of State Regulation

In issuing the 2017 Final Rule, the CFPB had determined that state regulation of payday and similar lending products had been insufficient to protect consumers nationally, both because some states had no specific regulations, while others had regulatory frameworks that the CFPB judged insufficient. This assessment was made even though seventeen states have banned payday lending and a like number have banned vehicle-title lending. In short, the 2017 Final Rule proceeds from the view that federal regulation was necessary in part because state regulation was inadequate.

The Proposed Rescission assesses state regulation from a different perspective. To the extent that states have issued specific regulations to address payday and vehicle-title lending for their own residents, the Proposed Rescission suggests an inclination to defer to the judgments of state governments as to whether or how to regulate or ban these products.[47] In fact, the Proposed Rescission attributed a recent decline in payday-lending complaints to the CFPB to the initiation of state regulations, suggesting that consumer injury had already been reduced.[48]

IMPLICATIONS

The analyses the CFPB used to support the contemplated rescission of the Mandatory Underwriting Provisions represent a far different policy approach to consumer financial protection than the policies cited to justify the 2017 Final Rule. Simply put, the Proposed Rescission represents a view that

consumers should be able to make financial decisions for themselves if sufficient information is available about a product's characteristics, even if the decision ultimately turns out unsatisfactorily for the individual consumer. Such a view places more responsibility on consumers to protect themselves from exploitation, while demonstrating less confidence in the ability of government rule makers to design systems that both protect consumers and foster healthy and competitive consumer financial markets. This approach, if applied more generally, would result in more agency reliance on general disclosures and the effectiveness of financial education[49] than on the underlying assessment of the impact of the product or service on the consumer. The analysis also puts more of the responsibility on, and reflects greater willingness to rely upon, state legislators and regulators to determine the level of their government's involvement in the financial decision-making of the citizens of their respective states.

The Proposed Rescission strongly suggests that the CFPB, at least pending receipt of comments, does not expect to re-issue a proposed rule that takes a different approach. In addition to the current CFPB's rejection of the legal analysis in the 2017 Final Rule, the Proposed Rescission states the Bureau "does not believe it is cost-effective for itself and for lenders and borrowers to conduct the necessary research to try to develop" support for another rule proposal.[50] The signal that the Bureau is planning to eschew rulemaking in this area was accompanied by a statement that enforcement action against payday and vehicle-title lenders will continue, based on conduct that the CFPB has previously found actionable.[51] These do not include actions, however, based on the lender's issuing such loans without performing an ability-to-repay analysis.[52]

It remains to be seen whether the Proposed Rescission's method of analysis will be extended to other areas or adopted by other regulators.[53] For example, the Proposed Rescission's unfairness analysis raises a question as to whether the CFPB would now consider it an unfair practice to bill consumers who had signed-up to obtain and were subsequently billed for credit monitoring services as a component of an identity theft protection product, when the consumers had failed to provide a federally required authorization for credit monitoring services.[54] In other words, the current CFPB could decide, based on the principles embodied in the Proposed Rescission, that a consumer could have reasonably avoided the harm of being billed for a service not received if he or she had simply provided the required authorization.

The CFPB Director has more recently testified before Congress that her mind remains open regarding the ultimate outcome of the Proposed Rescission.[55] In addition, the CFPB has also issued revisions to its examination manual for payday lending, with minor additions to the exam procedures, suggesting that the CFPB's supervisory presence in this area will not disappear. The Proposed Rescission will likely face an extensive amount of criticism from consumer groups and, if it survives the comment period, will likely face legal suits as well.

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ENDNOTES

[1] Bureau of Consumer Fin. Prot., *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, Docket No. CFPB-2019-0006 (RIN 3170-AA80) (to be codified at 12 C.F.R. § 1041), 84 FR 4252 (Feb. 14, 2019).

[2] 84 FR at 4298.

[3] The 2017 Final Rule was published in the Federal Register on November 17, 2017. *See* 82 FR 54472 (Nov. 17, 2017). The Bureau released its proposal regarding payday, vehicle title, and certain high-cost installment loans for public comment on June 2, 2016 (2016 Proposal). 81 FR 47864 (July 22, 2016). The Bureau received well over one million comments on the 2016 Proposal.

[4] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 § 1028(a), 124 Stat. 1376 (2010). The 2017 Final Rule became effective on January 16, 2018, although most provisions have a compliance date of August 19, 2019. On the same day the rule became effective, the CFPB announced its intention to engage in rulemaking to reconsider the 2017 Final Rule. *See* Bureau of Consumer Fin. Prot., Statement on Payday Rule (Jan. 16, 2018), https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/.

[5] *Cmty. Fin. Serv. Ass'n of Am.* v. *Consumer Fin. Prot. Bureau*, No. 1:18-cv-295 (W.D. Tex.).

[6] Although the Payment Provisions are beyond the scope of the current proposal to rescind, the CFPB stated in the Proposed Rescission that it intends to examine "a rulemaking petition to exempt debit card payments" and "informal requests related to various aspects of the Payment Provisions or the Rule as a whole, including requests to exempt certain types of lenders or loan products from the Rule's coverage and to delay the compliance date for the Payment Provisions." The CFPB will commence a separate rulemaking initiative if it "determines that further action is warranted." 84 FR at 4253.

[7] 12 U.S.C. § 5531(c)(1).

[8] 82 FR at 54472.

[9] 82 FR at 54597.

[10] 82 FR at 54594.

[11] *See* Ronald Mann, Assessing the Optimism of Payday Loan Borrowers, 21 Supreme Court Econ. Rev. 105 (2013), discussed at 82 FR 54472, 54568-70, 54592, 54597; see also *id*. at 54816-17, 54836-37 (section 1022(b)(2) analysis discussion of the Mann Study).

[12] 84 FR at 4263.

[13] 82 FR at 54600.

[14] 82 FR at 54603-12.

[15] *See* Pew Charitable Trusts, How Borrowers Choose and Repay Payday Loans (2013), http://www.pewtrusts.org/~/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-(1).pdf.

[16] 82 FR at 54480-81, 54485, 54490-91.

[17] 82 FR at 54485-86.

[18] 82 FR at 54579.

[19] 84 FR at 4264.

[20] 84 FR at 4259, 4264.

[21] 84 FR at 4264.

ENDNOTES CONTINUED

[22] 84 FR 4265, 4266, 4268.

[23] 84 FR 4268.

[24] 84 FR at 4266.

[25] 84 FR at 4266.

[26] 84 FR at 4268.

[27] 84 FR at 4269.

[28] 84 FR at 4269.

[29] 84 FR at 4270.

[30] 84 FR at 4270.

[31] 84 FR at 4270.

[32] 84 FR at 4271.

[33] 84 FR at 4271.

[34] 84 FR at 4271.

[35] 84 FR at 4271. The principal step-down exemption permits a certain number of covered short-term and longer-term balloon payment loans to be made without assessing the consumer's ability to repay so long as the loans meet a series of other conditions, including a requirement that the loan amount is amortized over successive loans by stepping down the principal over such loans. The CFPB had anticipated that the principal step-down exemption would be the predominant approach that payday lenders would use to comply with the Mandatory Underwriting Provisions.

[36] 84 FR at 4273.

[37] 84 FR at 4274.

[38] 84 FR at 4275.

[39] 84 FR at 4275.

[40] 84 FR at 4275.

[41] 84 FR at 4275.

[42] 84 FR at 4275.

[43] 84 FR at 4275.

[44] 84 FR at 4276.

[45] 84 FR at 4276.

[46] 84 FR at 4276.

[47] 84 FR at 4262 ("[T]he Mandatory Underwriting Provisions would impose requirements that would have the effect of reducing credit access and competition in the States which have determined it is in their citizens' interest to be able to use such products, subject to State-law limitations.").

[48] 84 FR at 4254.

[49] 84 FR at 4294 ("[I]improved financial education programs and opportunities could be a viable alternative to more direct market interventions such as issuing regulations.").

[50] 84 FR at 4253.

[51] 84 FR at 4262.

[52] *Id.* at 4262 n.134.

ENDNOTES CONTINUED

[53] The prudential banking regulators also enforce the Federal Trade Commission Act's prohibition on unfair acts or practices through authority under Section 8 of the Federal Deposit Insurance Act, 12 U.S.C. §§ 1818 (b), (e) & (i), but they do not have rulemaking powers. In 2013, the Office of the Comptroller of the Currency (the "OCC") and the Federal Deposit Insurance Corporation (but not the Federal Reserve) issued supervisory guidance to their respective banks concerning bank-issued small dollar consumer loans, primarily deposit-advance loans. Based largely on safety and soundness concerns, rather than on unfair or deceptive practices, the guidance was read to impose an "ability to repay" underwriting requirement on banks. 78 FR 70552 (Nov. 26, 2013) (FDIC); 78 FR 70624 (Nov. 26, 2013) (OCC). In 2017, the OCC rescinded the 2013 guidance, citing the promulgation of the CFPB's payday lending rule as making the OCC's separate guidance unnecessary and duplicative. 82 FR 47602 (Oct. 12, 2017). On February 11, 2019, the Comptroller of the Currency issued a statement supporting the CFPB's Proposed Rescission. *See* https://www.occ.gov/news-issuances/news-releases/2019/nr-occ-2019-14.html. Although the Comptroller of the Currency has voiced support for the CFPB's Proposed Rescission, it is not known whether the prudential banking agencies or the Federal Trade Commission (which has concurrent enforcement authority over non-bank payday lenders with the CFPB) would use the same methods of analysis that the CFPB sets out in the Proposed Rescission.

[54] *See, e.g.*, *In re Bank of America*, 2014-CFPB-0004 (Apr. 9, 2014).

[55] *See* https://www.regreport.info/2019/03/12/kraningers-open-mind-on-payday-lending-proposal-meets-democrats-closed-ranks-of-ire-in-senate-hearing/ (Mar. 12, 2019).

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