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October 7, 2016

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Docket No. CFPB-2016-0025, Payday, Vehicle Title, and Certain High-Cost Installment Loans

Dear Ms. Jackson:

The Independent Community Bankers of America¹ appreciates the opportunity to provide comments to the Consumer Financial Protection Bureau (CFPB or Bureau) on the Payday, Vehicle Title, and Certain High-Cost Installment Loans proposed rule (Proposal). The Proposal would require lenders, including community banks, to conduct an ability-to-repay analysis and loan verification, as

¹ The Independent Community Bankers of America, the nation's voice for nearly 6,000 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services.

With 51,000 locations nationwide, community banks employ 700,000 Americans, hold \$3.9 trillion in assets, \$3.1 trillion in deposits and \$2.6 trillion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA's website at www.icba.org.

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well as place restrictions on collection requests for many types of small-dollar credit. ICBA is deeply concerned that the Proposal would severely restrict or even prevent consumers from accessing safe and sustainable small-dollar credit from community banks.

I. Summary of ICBA's Position

ICBA's position is clear – any final rule must not be so broad and indiscriminate that it inadvertently forces community banks out of the small-dollar loan market. **ICBA strongly urges the CFPB to use its authority under Dodd-Frank to tailor regulations to exempt community banks from any final rule or provide a *de minimis* exemption for lenders – including community banks – which make 2,500 or fewer covered loans per year and derive 10 percent or less of their revenue from those loans. Any final rule must provide a clear path for community banks to continue making personal loans without new and undue regulatory burden.**

- The Proposal is prohibitively complex and prescriptive and would have a profound negative impact on community bank small-dollar lending. ‘
- It would be extremely detrimental to consumers if community banks are forced from the small-dollar loan marketplace by an onerous and unworkable new rule.
- If the Proposal is finalized without an exemption for community banks, ICBA is very concerned about the options consumers will be left with, which could include unregulated and unlicensed predatory lenders.
- Many consumers need access to small-dollar credit to meet emergency expenses or meet seasonal needs. Community banks offer small-dollar loans on terms that are safe and sustainable.
- While these loans are not a significant source of community banks profits – in fact, many community banks report small-dollar loans are not profitable – many continue to offer them as an accommodation to customers who need access to credit.
- Community banks offer, underwrite, and service small-dollar loans on terms that work for them and their customers and the Proposal will not improve the consumer experience.

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- The proposed ability-to-repay analysis, debt verification requirements, and limits on payment transfer requests will make small-dollar loans uneconomical for community banks to offer.
- There is no evidence that community banks offer covered short-term or longer-term loans on terms that are unfair or abusive.
- Subjecting community bank small personal loans to an arbitrary and prescriptive underwriting format would add substantial cost to the service and undermine the purpose for which these loans are offered.
- There is no statutory authorization for the CFPB to implement an ability-to-repay requirement for loans covered by the Proposal.
- Inclusion of insurance products in the all in cost of credit for longer-term loans violates both the Dodd-Frank Act and McCarran Ferguson Act.
- The 36 percent threshold for longer-term covered loans is an arbitrary metric that will act as a *de facto* usury limit in violation of the Dodd-Frank Act.
- Any final rule should remove the proposed anti-evasion clause as it is too broad and ambiguous.
- In response to the Proposal's specific question, lenders should not be required to provide disclosures in any language other than English.
- Any final rule should provide community banks no less than two years to implement new requirements.

II. Background

The CFPB has issued the Proposal pursuant to its authority under a number of Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act provisions, including Section 1031. Section 1031 allows the Bureau to prescribe rules applicable to a covered person or service provider if the CFPB identifies unlawful unfair, deceptive, or abusive acts or practices (UDAAP) in connection with any transaction with a consumer for a consumer financial product or service,

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or the offering of a consumer financial product or service.² This Proposal marks the first time the CFPB has proposed to use its UDAAP authority to issue a regulation.

The Proposal is intended to address the CFPB's concerns that: 1) consumers are taking out unaffordable loans and are therefore unable to break out of a cycle of dependency on these loans; and 2) certain lender practices to collect payment from consumers may cause substantial harm.

A. Scope of proposal

The Proposal would require lenders to conduct an ability-to-repay (ATR) analysis and loan verification for several types of small-dollar credit, including payday, vehicle-title, and certain high-cost installment loans. Specifically, the Proposal would apply to two types of covered loans (1) short-term loans that have terms of 45 days or less, including typical 14-day and 30-day payday loans; and (2) longer-term loans with terms of more than 45 days that have a total cost of credit that exceeds 36 percent; and access to repayment through a consumer's account or paycheck, or a non-purchase money security interest in the consumer's vehicle.

Under the Proposal, it would be considered an abusive and unfair practice for a lender to make a loan covered under the proposed requirements without reasonably determining that the consumer will have the ability to repay the loan. The Proposal also would identify it as an unfair and abusive practice to attempt to withdraw payment from a consumer's account for a covered loan after two consecutive payment attempts have failed, unless the lender obtains the consumer's new and specific authorization to make further withdrawals from the account.

III. Any final rule must ensure that community banks can continue to provide safe and sustainable access to small-dollar credit.

It is very clear – community banks are responsible lenders that do not engage in abusive lending practices. Community banks are an important source of safe and sustainable small-dollar credit for the consumers who need it most. According to a Federal Reserve study, nearly half of American households – 46 percent – could not cover an unexpected \$400 expense, would find it challenging to

² 12 U.S. Code § 5531(b).

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handle, or would cover it by selling something or borrowing funds.³ A Pew Charitable Trust Report indicated that 55 percent of American households have limited savings, meaning they can replace less than one month of their income through liquid savings.⁴ A survey by the American Payroll Association indicated that two-thirds of Americans (nearly 67 percent) would find it difficult or somewhat difficult to meet their current financial obligations if their paycheck was delayed for one week.⁵ Another report issued by the Consumer Federation of America and Certified Financial Planner Board of Standards indicated that 40 percent of adult Americans have no savings earmarked for emergencies.⁶

It would be extremely detrimental to consumers if community banks are forced from the small-dollar loan marketplace by onerous new regulations. If community banks are regulated out of this market, ICBA is very concerned about the options consumers will be left with, which could include unregulated and unlicensed predatory lenders. Given these factors, ICBA strongly encourages the Bureau to tailor any final rule to provide meaningful options that do not present new and undue regulatory burdens for community banks to continue to serve the small-dollar credit needs of consumers.

As explained in more detail below, the proposed requirements, exemptions, prescriptive underwriting, collection and recordkeeping rules would undoubtedly lead community banks to simply turn consumers away who are seeking a small-dollar loan when they need it most.

A. Provide an exemption from the proposed requirements for federally regulated depository institutions, including community banks.

The Bureau must recognize the stark differences between lenders that abuse consumers and the highly regulated consumer banking industry. Congress agrees. In granting supervision and rule-writing authority to the Bureau, it expressly isolates the payday lending industry from other consumer financial products and services.⁷

Additionally, section 1022(b)(3)(A) of the Dodd-Frank Act explicitly granted the Bureau the authority to tailor regulations by allowing the Bureau to

³ Board of Governors of the Federal Reserve System, "Report on the Economic Well-Being of U.S. Households in 2015," p.1, May, 2015

⁴ The Pew Charitable Trusts, "The Precarious State of Family Balance Sheets," p. 1, January, 2015.

⁵ American Payroll Association, "Getting Paid in America" Survey, p. 6, 2015.

⁶ Consumer Federation of America, "2013 Household Financial Planning Survey and Index," p. 23, September 2013.

⁷ 12 U.S.C. 5514(a)(1)(E).

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“conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products or services” from its regulatory requirements. ICBA urges the Bureau to use this authority to provide an exemption in any final rule for responsible lenders providing safe and sustainable small-dollar credit. Considering that there is no evidence that community banks provide problematic small-dollar loans, ICBA believes that a total exemption for community banks from the Proposal is warranted.

B. Provide an exemption from the proposed requirements for limited-volume lenders with a diversified business model.

While ICBA believes that exempting community banks outright from this Proposal would be best for consumers, if the Bureau chooses not to adopt such an approach, we suggest an alternative approach to recognize the significant differences between the responsible lending practices of community banks and other lenders. The Bureau has the authority for such an exemption.

Considering that there is no evidence that community banks provide problematic small-dollar loans, ICBA strongly encourages the Bureau to provide limited-volume lenders with a diversified loan and product portfolio a *de minimis* exemption which allow these institutions to continue to offer the same accommodation type loan products they currently offer without any new undue regulatory burden.

ICBA strongly urges that under any final rule, the term “covered lender” be defined to exclude any lender which originates 2,500 or fewer covered small-dollar loans per year and where the lender’s revenue from those covered loans is ten percent or less of the provider’s total revenue, excluding any overdraft fees associated with payments on those loans. Community banks report that tracking overdraft fees associated with a particular product or class of products would be impossible using current systems.

Community banks report that a *de minimis* exemption at those thresholds would capture most if not nearly all of the small-dollar loans community banks currently make. Additionally, a threshold at that level will enable many community banks to provide responsible and safe small-dollar loans to more consumers, as the demand for these safe products increases at community banks. Similar exemptions have been successful for the mortgage and remittance rules enabling community banks to continue to operate in those marketplaces, preserving competition amongst providers and resulting in diverse choices which ultimately benefits consumers. To preserve the viability

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of community bank small-dollar lending, we strongly urge the CFPB to adopt a *de minimis* exemption in any final rule.

C. Adopt a payment-to-income (PTI) alternative as a scalable alternative to promote innovation in small-dollar lending.

In addition to a *de minimis* exemption, ICBA also encourages the Bureau to consider a payment to income (PTI) alternative similar to the one outlined in the Bureau's initial framework released in March 2015. We recommend that such an alternative be provided for community banks exceeding the 2,500 loan/10 percent revenue threshold. Clear and simple guidelines would promote the entry of more participants in the marketplace. As demand grows, and more consumers seek small-dollar loans from their community bank, such an option would give community banks the ability to serve more consumers. Additionally, this option could permit community banks and other lenders the necessary flexibility to create new products that would be scalable and could fulfill consumer needs on a wide basis.

IV. Community bank participation in the small-dollar loan marketplace

Most community banks are locally owned and operated and have strong ties to their communities. Community banks also have close relationships with their customers and consequently, are very familiar with their customers' financial condition, history and ability to repay loans. Community banks are responsible lenders that do not engage in abusive lending practices, such as steering consumers to unaffordable loan products.

Generally, community banks offer personal loans as a service to customers where there is a financial history upon which to base a lending decision. Small-dollar loans are not a profit center for community banks. In fact, community banks report that they often lose money making small-dollar loans because the fees and interest do not cover the costs of underwriting and processing the loan. Even if these loans do not contribute to their profits, community banks make these loans because it is a part of serving the communities in which they do business.

Community banks report that consumers seeking these loans often need them for one-time expenses such as funeral costs, moving expenses, vehicle repairs, emergency home repairs, or to purchase fuel for the winter season. In other cases, community banks indicate that they offer personal loans to customers with non-traditional employment and incomes who need assistance bridging the financial gap between seasonal jobs. Finally, many community banks offer small-

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dollar loans to customers to consolidate debt into a loan with a reasonable interest rate and an affordable monthly payment.

Over the last year, ICBA has surveyed⁸ and held extensive discussions with our members to better understand how they would be impacted by the Proposal. ICBA's survey found that most community banks make loans that would likely be considered covered loans under the Proposal.

Product	Percentage of community banks offering short-term loans ⁹	Percentage of community banks offering longer-term loans ⁹
Personal loans under \$1,000	39%	74%
Personal loans of \$1,000 and above	45%	95%
Open-end lines of credit, excluding credit cards	10%	64%
Deposit advance products	10%	35%
Single payment loans	50%	91%
Loans secured by a non-purchase interest in a customer's vehicle	37%	95%
Loans with access to repayment through a customer's account or paycheck	32%	77%

A. Underwriting practices

While community banks report they take various steps to underwrite personal loans, 100 percent of the banks surveyed by ICBA indicate that they review an applicant's history with their bank before deciding whether to extend credit.

⁸ Between August 26, 2015 and September 4, 2015, 132 ICBA member community banks responded to an ICBA survey on their participation in marketplaces that could be covered by the CFPB Proposals.

⁹ ICBA's survey used the Proposal's threshold of 45 days as the cut-off between short-term and longer-term loans.

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Besides looking at the applicant's past history, community banks also rely on other types of traditional underwriting criteria and practices including pulling a credit report on applicants.

Underwriting Practice	Percentage
Review applicant's history with bank	100%
Check an applicant's borrowing history	92%
Verify an applicant's major financial obligations and debt	91%
Verify an applicant's income	80%

In order to keep fees affordable for consumers, 80 percent of surveyed community banks indicate they pull a credit report from just one of the major reporting bureaus for each loan application. Community bankers have told ICBA that they pay approximately \$5-\$7 for a single bureau report on consumer loan applicants as compared to approximately \$16-\$18 for a "tri-merge" report – a merged credit report – from all three major bureaus.

Community banks also indicate that for smaller personal loans, they rely heavily on "soft" factors such as the length of their relationship with the consumer and stated income. These underwriting practices differ for larger loans, which often require additional documentation for factors such as income and financial obligations. Relationship lending provides community banks the ability to shape loans to unique circumstances and situations that will likely not be possible if the Proposal is finalized without an exemption for community banks.

B. Fees Charged to Consumers

ICBA's survey found that community banks generally charge flat origination fees for different personal loan products. While community banks report that they charge a variety of different types of fees, origination fees are the most prevalent among the personal loan products in ICBA's survey. Fees are set at a fixed-dollar amount OR set as percentage of the principal. The average fixed-dollar fees range between approximately \$28 and \$94 and where fees are set as a percentage of principal, fees averaged between two and three percent.

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For those loans where a lender takes a non-purchase interest in a borrower's vehicle, 18 percent of community banks charge the borrower a fee for vendor single interest (VSI) insurance with an average cost of \$25.

V. The Proposal's requirements are overly complex and prescriptive and will likely result in many community banks severely curtailing or ceasing to make small-dollar loans.

As detailed in this comment, community banks fully underwrite small-dollar consumer loans. However, each community bank that makes small-dollar loans underwrites these loans in a way that works for them and their customers. Through years of experience, they have developed processes that allow them to make small-dollar loans as efficiently and cost-effectively as possible. It is something that works well for community banks, consumers, and their communities as exhibited by extremely low community bank default and vehicle repossession rates. The Proposal would upend this system, implementing complex and prescriptive requirements that would not improve the consumer experience and would threaten community bank small-dollar lending.

Under the Proposal, before issuing a short-term loan, a lender would have to make a reasonable determination that a consumer would be able to make payments on the loan and be able to meet the consumer's other major financial obligations and basic living expenses without needing to re-borrow over the ensuing 30 days. Specifically, a lender would have to:

- Obtain a consumer's written statement of the amount and timing of the consumer's net income and payments required for the consumer's major financial obligations;
- Review a consumer's borrowing history in its and its affiliates' records and a consumer report obtained from a registered information system;
- Verify and project the consumer's net income, debt obligations, and housing costs;
- Forecast a reasonable amount of basic living expenses necessary for a consumer to maintain the consumer's health, welfare, and ability to produce income; and
- Determine the consumer's ability to repay the loan, major debt obligations including housing costs, and basic living expenses for 30 days after the loan payment.

Before making a covered longer-term loan, a lender would have to make a reasonable determination that the consumer has the ability to make all required payments as scheduled. The proposed ATR requirements for covered longer-term loans closely track the proposed requirements for covered short-term loans

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with an added requirement that the lender, in assessing the consumer's ability to repay a longer term loan, reasonably account for the possibility of volatility in the consumer's income, obligations, or basic living expenses during the term of the loan. According to the Proposal, reasonably accounting for volatility requires considering the length of the loan term because the longer the term of the loan, the greater the possibility that residual income could decrease or basic living expenses could increase at some point during the term of the loan.

While ICBA understands the need to police the practices of irresponsible lenders and protect consumers, such requirements will undoubtedly remove responsible community banks from the personal loans marketplace due to the additional costs and burden of complying with another set of new regulatory requirements.

Most community banks have close relationships with their customers and consequently, are very familiar with their customers' financial condition. The majority, if not all, community banks practice some type of underwriting for these loans ranging from "soft" factors such as the length of their relationship with the consumer and/or relying on their stated income to more traditional practices such as reviewing applicants' credit report and verifying income. However, it is clear that providing covered loans to consumers is primarily provided as a service to their customers and not as a profit source, enabling community banks to shape loans and underwriting practices to the unique circumstances and situations of consumers. Subjecting these loans to an arbitrary and prescriptive underwriting format would add substantial cost to the service and undermine the purpose for which these loans are offered by community banks.

A. Income Verification

The Proposal would require that a consumer's net income be verified by a reliable record of an income payment covering sufficient history to support the lender's projection as well as a customer's written statement. Lenders would be required to develop policies and procedures for establishing the sufficient history of net income payments in verification evidence to support their projection. The Proposal indicates the Bureau's belief that the proposed requirement is sufficiently flexible and provides multiple options for obtaining verification evidence for a consumer's net income. The Bureau cites examples, such as paystubs, bank account statements showing deposits, and data derived from account data aggregator services as sufficient verification evidence.

Such an approach to income verification will be burdensome not only to the community bank lenders but to the consumers they serve as well. While the majority of community banks we surveyed verify income, it is important to

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note that community banks also service many customers with non-traditional income sources and are currently able to tailor their underwriting practices and income verification to meet these customers' needs. These proposed requirements would have an unfair and disproportionate impact on these consumers.

Many consumers are paid in cash and do not have paystubs or direct account deposits for income verification. The Bureau believes that consumers who are paid in cash and hold deposit accounts generally deposit their income payments into a deposit account which could easily be verified. However, this suggestion does not address consumers who are paid in cash and do not hold deposit account. These un-banked consumers arguably are the individuals more likely in need of these small-dollar loan products and would be disproportionately impacted by the proposed rule.

Furthermore, those consumers that hold a deposit account and receive all cash income payments withhold a portion of their cash income deposit for general living expenses, such as groceries and gas. Similarly, consumers who receive a portion of their income in cash, such as restaurant wait-staff, tend to deposit the portion of their income that was received by check into an account and retain at least some of the cash portion of their income for daily expenses. Under the proposal, these consumers would not be able to use that portion of income for verification evidence. Deposit account records in these instances would not accurately reflect a customer's net income and lenders would not be able to obtain accurate verification evidence or income projections.

Consumers in these situations would be twice penalized as a result of a lender's inability to consider a consumer's undeposited cash income. The Proposal would require lenders to calculate and account for general living expenses in determining a consumer's ability to repay while simultaneously prohibiting lenders from including the undeposited cash income – which is often used to pay for those very same general living expenses – in its ability-to-repay calculations.

Additionally, the proposed income verification and projection requirement would effectively remove self-employed individuals from community banks' small-dollar lending market. Community banks are prodigious small business lenders and hold a disproportionate market share of small business loans. The type of small business lending community banks do simply cannot be duplicated by other lenders outside the community and cannot substitute the skills, knowledge, and interpersonal competencies of many community banks. These loans can range from small-dollar loans, which could be covered under

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the Bureau's proposed rules, to traditional small business lending. Community banks thrive on their relationships with small business customers, understand their businesses and needs, and do not want to turn them away because they are unable to meet the Proposal's prescriptive requirements.

There are many consumers, often living in rural areas, who are sole proprietors and whose primary source of income is earned through either the various services provided or items sold. Generally, there is volatility in the income stream in these businesses, particularly those engaged in junk dealing, salvage yards, and day laborers. Under the proposed income verification provision, community banks would be unable to verify the income source and timing of their customer's income and would regrettably turn these sole proprietors and self-employed customers away.

Again, community banks have close relationships with their customers and consequently, are very familiar with their customers' financial condition, history and ability to repay loans. They often work with their customers to identify any upcoming service jobs or potential sales of a particular item or items to determine a customer's ability to repay a loan. In discussions with community bankers, their customers generally repay their loans when the aforementioned service or sale is completed and the customer gets paid.

B. Debt Obligations

Under the Proposal, lenders would be required to verify a consumer's required payments for debt obligations through a national consumer report, the records of the lender and its affiliates, and a consumer report obtained from a currently registered information system, if available. In addition, a lender may base its projections on consumer statements of amounts and timing of payment for major financial obligations, but only to the extent the statements are consistent with the verification.

Housing Expenses

The Proposal provides a lender with three methods from which it could choose to obtain verification evidence for a consumer's housing expense. To verify mortgage payments, a lender may obtain a national consumer report. To verify rental payments, a lender may obtain a transaction record of recent housing expense payments or a rental or lease agreement. The final method enables a lender to estimate a consumer's share of housing expense using a reliable method based on the individual or household housing expenses of similarly situated consumers.

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This verification process disproportionately targets consumers who do not own their home. While mortgage payments are typically reported to a national credit reporting agency, rental or lease payments are not. The Proposal suggests that alternatively a lender may rely on a monthly bank statement or lease agreement to verify rental obligations. However, the monthly checking account statement provided by some financial institutions displays only a check number and check amount. Providing a monthly bank statement would not verify to whom a check is made payable and lenders would not be able to distinguish a rent payment from other check withdrawals. To verify housing costs, a consumer would likely be required to produce a copy of a cancelled check, for which there might be a fee if the check is withdrawn from another financial institution. In addition, community bankers report that it is very common for tenants to misplace their original rental or lease agreement. In many instances, tenants would need to request a copy of the agreement from their landlord, which may take several days, require a fee, or may not be honored.

Not only does this make verifying housing expenses for consumers who do not own their own home substantially more difficult, it puts the responsibility and onus of producing verification evidence on the consumer, rather than the bank, as is the case with home owners with a mortgage loan. Such a disadvantage to non-home owners undoubtedly would drastically reduce their ability to obtain these services.

To address less formal arrangements the Bureau is proposing the option of estimating a consumer's share of housing expense based on housing expenses of similarly situated consumers. The proposal enables a lender to use data from a statistical survey, estimate individual or household expense in the census tract or locality where the consumer resides or estimate housing expense based on data reported by applicants to the lender, provided the lender periodically reviews the reasonableness of the relied upon estimates by comparing the estimates to statistical survey data or another reasonable method.

While such an option may appear to be a reasonable alternative, the Bureau does not take into consideration the costs to community banks to obtain such data, nor the wide fluctuations in housing costs in certain localities. The alternative verification option would increase the costs of providing this already unprofitable service offered by community banks. Small-dollar loans are not a profit center for community banks, and the fees currently charged often do not cover the costs of underwriting and processing the loan. Even if they are not profitable, community banks make these loans because it is a part of serving the communities they do business in. However, requiring these

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verification methods would exponentially increase the underwriting costs of small-dollar and emergency loans and would unquestionably significantly curtail small-dollar, emergency lending services by community banks.

Additionally, many customers have non-traditional living arrangements and would be unable to obtain an emergency loan under these requirements. The Bureau specifically states that under its proposed rules, lenders would not be able to accommodate those consumers who live rent-free with a friend or relative. Ironically, these individuals are likely to be the consumers that are most in need of emergency, small-dollar funding. Aging parents on limited incomes or young adults just entering the workforce are often in a situation where their income does not afford them the ability to live on their own. In these instances, those fortunate enough to live rent-free are generally able to afford their daily living expenses and would certainly have the ability to repay a small emergency loan when there is no obligation to pay for housing. However, as proposed, the verification requirements would prevent the consumers who need these loans the most from accessing safe and sustainable small-dollar credit from community banks.

Living Expenses

The Proposal would require that basic living expenses be included in an ATR analysis. Basic living expenses would be defined as expenditures, other than payments for major financial obligations, that a consumer makes for goods and services necessary to maintain the consumer's (as well as financially dependent household members') health, welfare, and ability to produce income. The proposed definition of living expenses is a principle-based definition and does not provide a comprehensive list of expenses.

When calculating an ATR analysis, a lender would be required to reasonably determine a dollar amount that is sufficiently large so that the consumer would likely be able to make the loan payments and meet basic living expenses without having to default on major financial obligations or having to rely on new consumer credit during the term of the loan. Lenders would not have to verify or provide a detailed analysis of every individual consumer expenditure, and would have the flexibility in how they determine dollar amounts that meet the proposed definition, as long as the amounts are not so low that they are not reasonable for the types and level of expenses.

Reasonably determining a dollar amount that a consumer spends on necessary goods and services would unnecessarily increase the underwriting costs and burden of providing small-dollar loans to community bank customers. Reasonable methods of estimating basic living expenses may

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include setting minimum percentages of income or dollar amounts based on a statistically valid survey of expenses of similarly situated consumers, taking into consideration the consumer's income, location, and household size; obtaining additional reliable information about a consumer's expenses or a method that reliably predicts basic living expenses.

In determining how to reasonably calculate a consumer's basic living expenses, the Proposal does not consider that a community bank would certainly be charged a fee for access to surveys and other predictable and reliable statistics on average living expenses. While such a fee may not be substantially large by itself, taken collectively with the other additional procedural and administrative costs necessary to administer small-dollar loans under the Proposal a community bank would surely make these loans at a substantial loss, making such loans an unsound business practice.

Additionally, basic living expenses can vary greatly between consumers living in similar situations in similar locations, particularly in goods and services such as food, utilities and transportation. As discussed previously, many consumers are in non-traditional living situations. These consumers may restrict their product consumption because of the situation in which they are living and do not fit in the one-size-fits-all statistic regarding basic living expenses in their locality. For instance, there may be a wide disparity in food costs between neighbors simply because of the different product preference or consumption of each. Furthermore, in an effort to ensure repayment, consumers may reduce their daily expenses for the duration of the loan term which again, is not reflected in the one-size-fits-all statistic.

C. Credit reports

The Proposal requires lenders to use credit reporting systems to report and obtain information about covered loans. The Bureau indicates that it believes to protect consumers a lender must have access to reasonably comprehensive information about a consumer's current and recent borrowing history, including covered loans made to the consumer by other lenders, on a real-time or close to real-time basis.

The cost of credit reports is already a significant portion of the expense for processing small-dollar loans. The Bureau acknowledges the significant costs that are associated with obtaining credit reports and attempts to address this concern by proposing that a lender is not required to obtain a credit report unless the lender is otherwise prepared to make a loan to a particular consumer. Because of the cost of obtaining a credit report, the Bureau

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expects that lenders will order such reports only after determining that the consumer otherwise satisfies the ATR requirement.

Community banks generally pull a national credit report to obtain a customer's borrowing history. However, this practice is typically reviewed in conjunction with other "soft" factors, such as the applicant's history with the community bank and knowledge of the customer's financial situation.

The Proposal's requirements for obtaining and verifying income and debt obligations would substantially increase the amount of time it would take to underwrite a small loan. The Proposal suggests that for each applicant, a community bank would require a customer's written statement of his net income, major financial obligations, other debt obligations and general living expenses. A community bank would be required to obtain verification of income and verification of recurring housing costs. A community bank would then conduct a preliminary analysis based on this information by forecasting a reasonable amount of basic living expenses for the consumer and projecting the applicant's net income, debt obligations and housing costs during the term of the loan.

If the applicant is approved, the lender would then be required to pull a national credit report and, if available, a consumer report from a registered information system and compare the information originally provided by the applicant with the consumer reports. A community bank would then be required to conduct a second ATR analysis based on any new or contradictory information.

To avoid a secondary analysis and approval process, a community bank may choose to pull credit reports and registered information system consumer reports prior to conducting its initial analysis. However, pulling the required reports prior to obtaining a preliminary approval increases the costs to the bank. A lender may need to evaluate and pull credit and consumer reports for several applications before approving and originating a single loan. As a result, the costs to a lender are significantly higher per approved loan.

D. Using a different definition of APR is problematic, will harm consumers, and needlessly complicates consumer lending.

The proposed rule defines the "total cost of credit" to include finance charges associated with the loan as set forth by the regulations implementing the

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Truth in Lending Act¹⁰, as well as any charge that the consumer incurs in connection with the credit insurance, and credit-related ancillary product, service, or membership sold before, at the same time as, or within 72 hours after the consumer receives the entire amount of funds that the consumer is entitled to receive under the loan, including any charges for application, sign-up, or participation in a credit insurance plan, and any charge for a debt cancellation or debt suspension agreement. The total cost of credit also includes any application fee charged to a consumer who applies for a covered loan; and any fee imposed for participation in any plan or arrangement for a covered loan.

The Proposal would use an all-in measure of the cost of credit rather than the definition of APR under Regulation Z. The Proposal indicates that the proposed measure includes the necessary types of charges that reflect the actual cost of the loan to the consumer. The proposed total cost of credit would include many optional consumer asset and credit protection products including credit life and disability insurance.

Discussions with community bankers reveal that most community banks offer loan products with an all-in APR of 36 percent or higher with access to repayment through a customer's account or with a non-purchase security interest in a customer's vehicle. Community banks have also reported that a total cost of credit of 36 percent is easy to reach for many loan products, especially when lending relatively low dollar amounts for short durations, sometimes as few as 60 days.

Optional credit life and disability insurance can offer important and targeted financial protections to consumers and their families. When tragedies occur, credit life and disability insurance ensure that borrowers and their loved ones are not left without the means to cover the insured financial obligations. Community banks report they will cease to offer these products if they will cause loans to exceed the 36 percent total cost of credit.

Community banks also report that their core processors do not currently have the ability to calculate or track the proposed 36 percent total cost of credit. The proposed definition of total cost of credit will require systems changes and staff education and training. The changes will likely also needlessly confuse consumers who have become accustomed to the Regulation Z definition of APR over the past several decades.

¹⁰ Regulation Z, 12 CFR 1026.4, but without regard to whether the credit is consumer credit, is extended by a creditor, or is extended to a consumer as these terms are defined by 12 CFR 1026.2(a)(12), 12 CFR 1026.2(a)(17), 12 CFR 1026.2(a)(11) respectively.

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E. Payment transfer disclosures would not improve the consumer experience

Generally, under the Proposal, lenders would be required to provide written notice before each lender-initiated payment transfer attempt from a consumer's account. Depending on the method the lender chooses, they would be required to send the consumer notice of an upcoming payment transfer request no earlier than 10 business days and no later than 3 business days prior to initiating the transfer.

Disclosures must be provided in writing and in a form that can be viewed on paper or a screen. Disclosures may be provided through electronic delivery so long as the consumer affirmatively consents in writing or electronically to the particular electronic delivery method. However, to obtain valid consumer consent, a lender must provide the consumer with the option to select email as the method of delivery, separate and apart from any other electronic delivery methods such as mobile application or text message.

The disclosure must use language that is substantially similar to the language set forth in the proposed model forms and include the statement "Upcoming Withdrawal Notice" or "Alert: Unusual Withdrawal," if applicable, using that phrase, and, in the same statement, the name of the lender providing the notice. The disclosure must also include:

- the date that the lender will initiate the transfer;
- dollar amount of the transfer;
- sufficient information to permit the consumer to identify the account from which the funds will be transferred;
- sufficient information to identify the covered loan;
- the payment channel of the transfer;
- if applicable, the check number associated with the transfer;
- the annual percentage rate of the covered loan;
- payment breakdown in tabular form to include the amount of the payment that will be applied to principal, interest, fees and other charges;
- other information as applicable.

Such a disclosure coming from a financial institution would be disconcerting to most consumers questioning why such a comprehensive disclosure is being sent. At a time when regulatory burden is at its highest, requiring a separate and additional disclosure merely reiterating what a consumer has already contractually agreed to is unnecessary and redundant. Community

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banks report that they generally would not provide these notices electronically, and would likely rely on a mailed notice. Consequently, the costs of generating paper payment transfer notices along with the postage for mailing would be an additional expense when servicing covered loans. The more expensive small-dollar loans become to originate and service, the more likely community banks will be to reduce or even eliminate lending in that market.

Finally, under the Proposal, there is no means for a consumer to opt out of receiving payment transfer request notices. It is not clear that all consumers need or would want to receive these notices. Consumer frustration at receiving unwanted notices will likely be directed at lenders. A simple solution is to allow consumers to opt out of receiving notification regarding payment authorization attempts.

F. Prohibiting payment transfers after two consecutive failed transfers will make small-dollar credit less available from community banks

The Proposal indicates it would be an unfair and abusive act or practice for a lender to attempt to withdraw payment from a consumer's account after the lender's second consecutive attempt has failed because of a lack of sufficient funds, unless the lender obtains the consumer's new and specific authorization to make further withdrawals from the account. The Proposal further prescribes the requirements and conditions by which a consumer's authorization may be obtained. It is not clear from the Proposal how the new requirements, which will increase loan and servicing costs and reduce customer convenience, would improve the consumer experience.

As proposed, a lender's request must include the payment transfer terms, which include the specific date, amount, and payment channel of each additional payment transfer and, if applicable, a request to collect an additional amount for a late fee or returned item fee. The lender's request may be provided in writing, by mail or in person, or in a retainable form by email if the consumer has consented to receive electronic disclosures.

The lender may also provide the request by oral telephone communication, if the consumer affirmatively contacts the lender in that manner and agrees to receive the terms and statements in that manner. However, if the authorization is granted in the course of an oral telephone communication, the lender must record the call and retain the recording. Additionally, the lender must follow up with the recorded call by providing a memorialization in a retainable form to the consumer before the first authorized payment transfer is initiated.

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To justify such a requirement, the Bureau conducted an analysis of the success rate of online lenders' attempts to collect payments after two unsuccessful attempts and determined that the failure rate after two consecutive unsuccessful attempts is 73 percent. Interestingly, the Bureau does not have similar information on lenders that are also the consumer's account-holding institution, but merely states that there is no reason to assume that the lenders are more likely to yield better results despite having more information about the condition of the consumer's account.¹¹

The Bureau further stated that consumers are likely to have incurred NSF fees from their account-holding institution and, where permitted, returned-payment fees from the lender for each failed attempt at collecting payment. Therefore, the Bureau theorizes, most of these consumers will incur significant additional monetary and other harms.

While the Bureau's concern that consumers may be subject to multiple fees and other harms is appreciated, it fails to recognize that although community bank lenders who are also the consumer's account-holding bank will access a consumer's deposit account when the borrower falls behind in their payments, they do not typically assess fees when attempting to collect loan payments from a customer's account. In fact, it does not serve any benefit to community bank lenders holding their customer's account to continue adding excessive fees on an already low or negative account balance, particularly when the customer has an ongoing history with the community bank.

Of the community banks ICBA surveyed, 87 percent indicate that they will use access to a consumer's deposit account when the borrower falls behind in their payments. Access to the deposit account is generally the contractual or statutory right of set-off commonly included in loan disclosures, contracts and other account opening disclosures. It is important to note community banks only access customer accounts held at their own bank and do not access accounts held elsewhere. Consumers are made aware of such terms and conditions and give their consent when they are presented with these disclosures. Unless specifically stated in its disclosures, there is no need for additional authorization because the customer has already consented.

Further, as stated throughout this comment, these type of loans are not offered as a profit source for community banks, but out of the needs of consumers within communities they serve. If the Bureau requires banks to

¹¹ 81 Fed. Reg. 47864, at 47____ (July, 22, 2016). [page 712 in proposal]

obtain additional authorization after two failed attempts, community banks will find themselves on an endless path of chasing new authorizations each time they try and fail to withdraw from an account.

Many community banks do not exercise the right to set-off as soon as a payment is late. Their normal practice is to mail a notice or sometimes place a telephone call to a consumer to let them know they are in default. Community banks indicate that the initial notice of default will prompt most consumers to make payment or, in rarer cases seek a loan modification. Many community banks report that if a customer is paying a small-dollar loan by check and there are insufficient funds in the checking account that they will hold the check and call the borrower to provide them an opportunity to deposit additional funds. Likewise many community banks report that they will not charge a fee for a failed ACH if that's how the consumer has chosen to make payments.

These proposed requirements to access a customer's deposit account would also add additional expense and unnecessary complexity to the long established operational, technical and procedural payments system. It has been a longstanding industry practice to enable three presentment attempts (an initial attempt to collect followed by up to two re-presentments) for either an ACH debit or check that is returned for insufficient funds. Enabling lenders a reasonable opportunity to collect authorized payments provides an appropriate balance for both the lenders and their customers as well as maintains consistency between payment practices for covered loans and all other payment processes.

Community bankers also indicate that providing customers advance notice of an upcoming debit for a past due loan payment would provide customers the opportunity to withdraw the funds subject to set off, depriving banks of the opportunity to collect past-due amounts under a legal, long-standing practice. ICBA's discussions with bankers also revealed that many banks use deposit account access to collect payment at the request of the customer because many consumers find it convenient and helpful with their budgeting.

Additionally, the sheer prescriptive and detailed nature of the proposed authorization request would leave many institutions unable to collect on a debt that is rightfully owed. As previously stated, providing an advance notice of the specific date of an upcoming debit to collect on a past due payment would provide certain customers an opportunity to withdraw available funds simply to avoid repayment. Additionally, bank customers have varying repayment schedules, often to coincide with their income deposits. For example, it is common for customers to have payment due dates on the first,

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the fifth, fifteenth, or the thirtieth of the month, so that payments are withdrawn after the customer is paid. Community banks attempting to collect past due payments would be required to provide an authorization request that specifies the exact date a collection payment will be withdrawn for each past due customer. This would be unnecessarily difficult and time consuming for community banks to determine because they will need to adjust their authorization request for each customer based on that customer's income deposits (if applicable) or account balance history. In addition to determining a withdrawal date for each customer, lenders would then be required to draft, and mail to the customer the authorization request with this information. To comply with these requirements, community banks would incur significant costs in updating systems and training staff.

VI. The Proposal's exemptions are overly complex and cost prohibitive and are unlikely to be used by community banks.

ICBA acknowledges the Bureau's good faith effort to address the differences of responsible lenders by creating these limited exemptions. In fact, ICBA appreciates and agrees with Director Cordray when he recognized that community banks and their customers have a mutual stake in one another's success and in drafting a rule wanted to encourage other lenders to follow the small-dollar lending model of community banks and other responsible lenders.¹²

However, rather than encouraging the continuation and growth of community bank small-dollar lending, the proposed exemptions would have the opposite effect. The Bureau is proposing a conditional exemption based on the National Credit Union Administration's Payday Alternative Loan (PAL) program; a short-term loan exemption and an exemption for longer-term loans. In discussions with community banks, they indicate that they would be unlikely to use either the both the PAL program and short-term loan exemptions. Similarly, the exemption for longer term loans, along with the remaining requirements are complex and onerous and are unlikely to be widely used, if at all. It is clear that at best, if the rule is finalized as proposed, there will be fewer community banks offering small-dollar loans. A result we are certain was not intended by the Bureau. ICBA's message is clear: Do not fix what is not broken.

¹² Prepared Remarks of CFPB Director Richard Cordray, CFPB Field Hearing on Small Dollar Lending, available at <http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-richard-cordray-director-consumer-financial-protection-bureau/> (June 2, 2016).

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Conditional exemption for longer-term loans up to 24 months

A lender would be permitted to make a covered longer-term loan, without having to satisfy the ability-to-repay requirements or provide the consumer with a disclosure prior to initiating a payment from the consumer's account (payment notice), so long as the loan meets certain structural conditions and has an annual portfolio default rate of not more than 5 percent.

Under the conditional exemption, a loan would be required to have:

- A term of at least 46 days but not longer than 24 months;
- Fully amortizing monthly payments;
- No prepayment penalties; and
- A modified total cost of credit of less than or equal to an annual rate of 36 percent.

A "modified total cost of credit" is the total cost of credit excluding a single origination fee that is no more than \$50 or that is reasonably proportionate to the lender's costs of underwriting.

A. Restricting exempt loans to two every six months is arbitrary and adds little protection for consumers.

A lender would also have to determine that it or its affiliates had not made more than two loans under this exemption to the consumer within the last 180 days. The Bureau believes that if a consumer seeks more than two loans made under the exemption within a period of six months, the prior loans may not have been affordable and it would be inappropriate to allow the lender to continue to make covered longer-term loans without an ability-to-repay determination and providing the payment notice that would be required for covered loans.

The Bureau is seeking comment on whether the borrowing history condition in the exemption is appropriate and whether two loans in a 180-day period meets its objectives. Using a two-loan limit in a consumer's borrowing history does not appropriately address whether, in retrospect, the two loans already issued and repaid were affordable but rather simply curtails future small-dollar lending to consumers.

Community banks are invested in making sure their customers are able to repay personal loans. Community bankers told ICBA that they would not roll over a loan when they know the customer is unable to repay and that charging extra fees is not their business model. Seventy percent of community banks indicate that they allow borrowers to roll over loans. Those

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banks report that 52 percent of borrowers do not roll over loans, 26 percent roll over once, 12 percent roll over two or three times, and only 4 percent roll over more than three times. For those customers that do roll over short-term loans, most community banks offer either financial counseling or other loan options with 49 percent reporting they offer these options each time a customer requests a refinance and 10 percent do so after the second or third request.

Community bank customers seek small-dollar loans for a variety of reasons. Many are able to meet the needs of their day to day expenses without issue, but are unable to pay for an unexpected emergency or additional expenditure. While small emergency loans may occur infrequently, customers may rely on their community bank to help them throughout the year for other, seasonal or additional expenses. In discussions with community bankers, customers often rely on their bank for an annual loan to cover holiday gifts as well as a second loan for their family vacation. Community bankers report that these loans are paid in full and are relied upon by grateful customers. With the Bureau's proposed two-loan limit, these responsible consumers may easily reach the two loan limit leaving them with limited options for any subsequent unexpected emergencies requiring another small-dollar loan.

Additionally, the Bureau does not provide data or analysis to support its supposition that that more than two loans within a six-month period would suggest that a consumer cannot afford the loan product. While the Bureau provides examples of several states that limit the number of rollovers a lender may give to a consumer, those references suggest that recurring rollovers *without a cooling off period* may be detrimental to the financial wellbeing of the consumer – not whether a consumer can afford a third loan within a six-month period.

This is underscored by the Proposal's alternative PAL program exemption that permits lenders to make three loans within a six-month period rather than two. The Bureau's PAL program alternative exemption is based on the National Credit Union Administration's Payday Alternative Loan program. By permitting a different loan cap than the longer-term loan exemption, the PAL exemption belies the Bureau's own declaration that a two-loan limit protects consumers against potentially unaffordable loans. In fact, the Proposal does not apply the same reasoning to the longer-term exemption as it does to its proposed PAL program exemption. The Bureau's assumption in the longer-term exemption that the number of loans a consumer requests correlates to the consumer's ability to repay the loan is not used for its PAL program exemption. Rather, the Bureau bases the affordability of its PAL program loans on the application fee and periodic interest rate of the loan.

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Basing the affordability of different small-dollar loan products on different variables underscores the arbitrary loan limits set by the Bureau and does not take into consideration that community banks meeting the longer term exemption requirements have varying application fees and interest rates. For example, a community bank may provide a small-dollar loan to a customer with lower or similar application fees and interest rates to the PAL program exemption, but with a principal loan amount outside the PAL program parameters, qualifying it for the longer-term exemption rather than the PAL program. In such an instance, despite the Bureau's assumptions of affordability, the consumer would be limited to two loans.

B. The default rate threshold and proposed refund will be costly and burdensome to community banks.

The projected annual default rate on all loans made pursuant to this conditional exemption must not exceed five percent. A lender would be required to refund all of the origination fees paid by all covered loan borrowers in any year in which the lender's annual portfolio default rate of five percent is exceeded.

The proposed rule would require lenders to calculate the portfolio default rate at least once every 12 months on an ongoing basis for loans made under the long-term exemption and if a lender's portfolio default rate for such loans exceeded five percent, the lender would be required to provide a timely refund of the origination fees charged on any loans included within the portfolio.

The proposed rule would prescribe the required method for calculating the portfolio default rate for loans made under the long-term exemption regardless of the lender's own accounting methods. Rather than calculating average daily balances, as many lenders do, the Bureau is proposing to require lenders to take an average of month-end balances at the end of each month in the 12-month period.

To calculate the portfolio default rate, a lender must calculate the total dollar amount owed on any longer-term exempt loan that was either delinquent for 120 consecutive days or more or charged off before becoming 120-days delinquent during the 12-month period. The total dollar amount is then divided by the average of month-end outstanding balances owed on all longer-term exempt loans.

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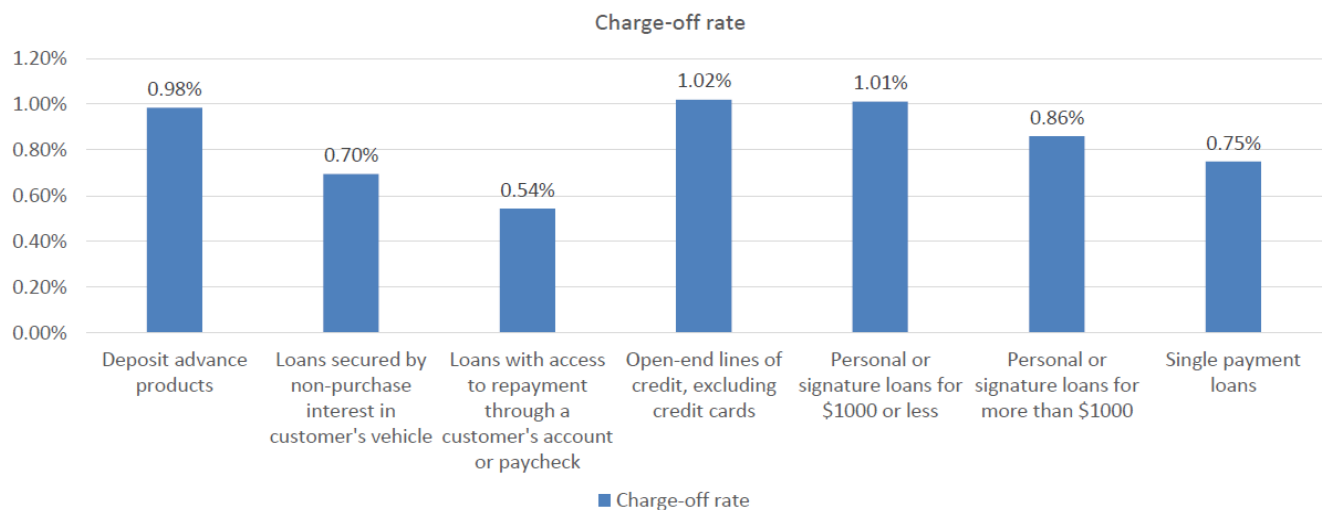
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Community banks experience extremely low charge-off rates as well as a low percentage of instances where a vehicle is repossessed when a bank takes a non-purchase interest in a customer's vehicle. This reflects the unique relationship between community banks and their customers and community banks' commitment to making personal loans only to those customers who have the ability to repay or in the case of relationship loans, the commitment to repay.

ICBA's survey found that charge-off rates for small-dollar loan products is extremely low, averaging between .5 and 1 percent.

Average Charge-off Rate by Loan Type



For loans where a bank takes a non-purchase interest in a borrower's vehicle, the average repossession rate was just .71 percent.

However, these results are based on the community banks' existing methods of calculating default rates, which may vary from the proposed method. For example, calculating default rates using a "monthly balance outstanding" rather than "original loan amount" could result in higher default rates. Additionally, requiring a prescriptive calculation of the default rate of those loans issued under the exemption imposes a disproportionate burden on community banks, diminishing their ability to effectively meet the credit needs of their customers and communities. Discussions with community bankers report that their core processing systems are unable to differentiate between covered and exempt loans from other small-dollar loans. This differs from

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larger or specialized lenders, which have dedicated resources to automate such calculations.

While ICBA's survey found that charge-off rates for small-dollar loan products are extremely low, setting an annual default rate to meet this conditional exemption would not only be extraordinarily burdensome but would also disproportionately impact those community bankers who provide a very small number of covered loans per year. Take, for instance, a community bank that does not have an independent small-dollar lending program, but periodically accommodates customers who request an emergency small-dollar loan. While on average, charge-off rates for small-dollar loan products for community banks are extremely low, averaging between .5 and 1 percent, for those community banks that do not issue many small-dollar loans, a five percent threshold could be easily crossed with just a handful of customers going into default.

The proposed rule would require that lenders with a portfolio default rate exceeding five percent per year refund to each consumer with a loan in the portfolio any origination fee excluded from the modified total cost of credit in the long-term exemption. Lenders would be required to provide these refunds within 30 calendar days of identifying the excessive portfolio default rate. A lender may deposit the refund into the consumer's deposit account, if the consumer elects to do so. The Bureau is seeking comment on the appropriateness of this "back-end" refund regarding the Bureau's objectives for consumer protection.

Unfortunately, rather than protecting consumers, such a requirement would likely lead community banks to eliminate small-dollar loans and unintentionally deny consumers access to safe and sustainable credit from community banks. As stated earlier, small-dollar loans are offered by community banks as a service to customers and are not a profit center. The fees charged and interest earned often do not even cover the costs of underwriting and processing the loan. This proposed requirement would add additional costs to administering these loans that would almost certainly cause community banks to exit the marketplace.

Requiring a refund to each portfolio loan customer is not a matter of simply crediting a customer's account. A refund such as this would require a lender to either issue and mail a check or, if the consumer elects to do so, deposit the refund into the consumer's account. Providing these options to the consumers would require an initial communication with each customer explaining the reason for the refund and the options available to receive the reimbursement. It is clear that customers in default of the loan would not elect

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to deposit the refund in a bank account for fear that the deposit would be automatically withdrawn to cover the delinquency. Therefore, it is likely that the bank would be issuing and mailing a check to each loan customer.

Additionally, the lender would need to include a letter explaining to consumers – at least five percent of whom would be in default with the lender – that because of the lender’s default rate, the consumer is being reimbursed for their origination fee. Not only does this proposed provision add the costs of postage, generating paper checks and paper mailings to the overall cost of providing these loans, it could also possibly incentivize consumers to default on future covered loans in hopes of getting reimbursed for future origination fees.

C. Account prohibitions for the conditional exemption of longer-term loans up to 24 months are unworkable.

Under the conditional exemption, if a lender holds funds on deposit in the consumer’s name, in response to an actual or expected delinquency or default on the loan a lender would be prohibited from:

- Sweeping the account to a negative balance;
- Exercising a right of set-off to collect on the loan, including placing a hold on funds in the consumer’s account; or
- Closing the account.

It is not clear how community banks would know when there is an expected delinquency or default on a consumer’s covered loan which would trigger the account prohibitions for the conditional exemption. Nor does the Proposal define an expected default or delinquency. There are countless factors that could affect whether a consumer may become delinquent or default. Community banks are not in a position to know most of these factors or have the ability to judge unknown situations that could impact a consumer’s ability to make a loan payment.

As described previously in the comment, the right to set-off is longstanding legal practice that is part of a contractual agreement between a community bank and customer. Additionally, it is a protection afforded community banks to ensure they are acting in a safe and sound manner. To prohibit such a protection would effectively put community banks in a position to provide credit that is uncollectible. This practice could easily be considered an unsafe and unsound practice by the banking regulators, which would effectively eliminate this product by the traditional banking lenders.

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That being said, many community banks do not exercise the right to set-off as soon as a payment is late. Their normal practice is to mail a notice or sometimes place a telephone call to a customer to let them know they are in default. Community banks indicate that the initial notice of default will prompt most customers to make payment. Furthermore, discussions with community banks indicate that they would also work with a customer who is struggling and may find a creative solution for repayment that would work for both the customer and bank.

Additionally, the Bureau's underlying reason for prohibiting the right to set-off is insufficient and flawed. The Bureau reasons that if the rule permits a right to set-off, the potential injury to a consumer is exacerbated because a lender may bring the customer's account to a negative balance or close the account. However, many community banks report that they do not generally transfer funds out of a customer's account leaving a negative balance, nor is it likely that they would close an account when it may be their only link to a delinquent customer.

In fact, it does not benefit the community bank to continue to add fees and charges to a negative account, increasing its loan losses. Community banks report that if a customer is paying a small-dollar loan by check and there are insufficient funds in the checking account that they will hold the check and call the borrower to provide them an opportunity to deposit additional funds. Likewise many community banks report that they will not charge a fee for a failed ACH if that's how the consumer has chosen to make payments.

V. Loan information collection and reporting requirements will likely greatly increase costs for community banks and reduce access to credit for consumers.

The Proposal would require lenders to use credit reporting systems to report and obtain information about covered loans. The Bureau indicates that it believes to protect consumers a lender must have access to reasonably comprehensive information about a consumer's current and recent borrowing history, including covered loans made to the consumer by other lenders, on a real-time or close to real-time basis. Under the Proposal, lenders would be required to report extensive information on covered loans, and would be obligated to provide updates both during the loan term and when the loan ceases to be an outstanding loan.

All of this information would be required to be reported to a Registered Information System (RIS). Due to the loan verification requirements of the

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Proposal, covered loan information would need to be provided and obtained from an RIS in close to real time. At this point it is unclear what entity or entities will seek to become a qualified RIS; however, it is likely that development of a system capable of those requirements will entail substantial investment. Not only will these costs inevitably be passed onto lenders in the form of fees for accessing the RIS, lenders will also bear the financial burden of capturing, reporting, and ensuring that information is kept current while a loan is outstanding as well as updating systems, and training staff. It is also likely that many community bankers – as smaller volume lenders – will be paying higher prices for accessing the RIS than larger participants who may be able to obtain better pricing through economies of scale based on the large number of requests they will generate.

As previously mentioned, the cost of credit reports is already a significant expense for processing small-dollar loans. Adding the cost of obtaining another report in addition to the existing credit bureau report along with the increased recordkeeping requirements will only increase the expense of making small-dollar loans for community banks.

As discussed throughout this comment, small-dollar lending is at best marginally profitable for community banks. Additional costs incurred due to the proposed recordkeeping requirements will make the economics of small-dollar lending even tougher for community banks. With a 36 percent total cost of credit threshold, it is likely much of the increased costs will not be passed onto consumers. Consequently, many community banks will likely abandon the small-dollar marketplace if they are losing significant money making those loans.

VII. There is no legal basis for regulating community bank small-dollar loans.

A. There is no evidence that community banks are providing small-dollar loans on unfair or abusive terms.

The Bureau issued the Proposal based in part on its authority under Dodd-Frank Section 1031 to regulate unfair, deceptive, and abusive acts and practices. The statutory language allows the Bureau to regulate acts or practices as unfair if it can reasonably conclude that:

- the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and
- such substantial injury is not outweighed by countervailing benefits to consumers or to competition.

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Likewise, the statutory language allows the Bureau to regulate acts or practices as abusive only if the behavior:

- materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
- takes unreasonable advantage of—
 - a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
 - the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
 - the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

The Proposal provides no evidence that community banks offer or service any small-dollar products – including covered short-term or longer-term loans – on terms that are unfair or abusive. Community bank small-dollar loans are not predatory loans and they do not perpetuate a cycle of indebtedness from which consumers are unable to break. Moreover, community banks are not in the business of rolling over or churning loans to produce fee income. As shown through ICBA’s survey, community banks underwrite all their small-dollar loans and the default and vehicle repossession rates are extremely low.

B. CFPB does not have the authority to proscribe ATR requirements for small-dollar loans.

No statute, including the Dodd-Frank Act, directs or authorizes the Bureau to establish ATR requirements for consumer credit. In contrast, other regulatory regimes that impose an ATR analysis were clearly required by Congress. For example, the Home Ownership and Equity Protection Act (HOEPA) requires consideration of “consumers’ repayment ability” for high-cost mortgages.¹³ The Dodd-Frank Act expanded HOEPA’s ATR provisions requiring lenders to “assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans.”¹⁴ It has been a long recognized that “[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally.”¹⁵ This rationale can be applied with regard to the Dodd-Frank

¹³ 15 U.S.C. §1639(h).

¹⁴ 15 U.S.C. §1639b. Those requirements were later implemented through the Ability-to-Repay and Qualified Mortgage Standards under the Truth in Lending Act (Regulation Z); Final Rule.¹⁴

¹⁵ EEOC v. Arabian American Oil Co., 499 U. S. 244

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Act, which expressly authorizes ATR requirements for mortgages in section 1639b, but does not extend that authorization to consumer loans.

Similarly, the Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009 also requires that issuers consider the “ability of the consumer to make the required payments” for a credit card account.¹⁶ Absent a statutory directive, the Bureau has no basis for implementing ATR requirements for small-dollar consumer loans.

C. The Proposal would regulate insurance products in violation of clear statutory prohibitions.

Under the Proposal, charges and fees associated with many optional insurance products - which offer important consumer protections - would be included as part of the all in cost of credit for longer-term loans. This would change long standing regulatory policy. Under Regulation Z, the cost of “voluntary credit insurance premiums” is not included in the APR calculation if the insurance product is not required by the lender.¹⁷ The Proposal justifies the inclusion of optional insurance products in definition of the all in cost of credit stating “lenders might otherwise shift their fee structures to fall outside traditional Regulation Z concepts and thus outside the coverage of proposed [rules].” That argument is invalid because the Bureau plainly does not have the authority to regulate insurance products as it would in the Proposal.

Dodd-Frank states “[t]he Bureau may not define as a financial product or service, by regulation or otherwise, engaging in the business of insurance.”¹⁸ Dodd-Frank defines the “[b]usiness of insurance” as “the writing of insurance or the reinsuring of risks by an insurer, including all acts necessary to such writing or reinsuring and the activities relating to the writing of insurance or the reinsuring of risks conducted by persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons.”¹⁹ The express meaning of this language could not be clearer.

¹⁶ 15 U.S. Code § 1665e.

¹⁷ 12 C.F.R. § 1026.4(d).

¹⁸ 12 U.S.C. § 5517(m).

¹⁹ 12 U.S.C. § 5481(3).

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In addition, the McCarran Ferguson Act, provides that the business of insurance is exempted from federal regulation absent a clear statutory directive:

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . .”²⁰

The Proposal’s inclusion of insurance costs in the total cost of credit for longer-term loans would have the CFPB regulating insurance products in violation of explicit statutory prohibitions.

VIII. The Proposal’s 36 percent threshold contains fatal flaws.

A. The 36 percent threshold for covered longer-term loans is an arbitrary and inflexible limit.

Under the Proposal, a covered longer-term loan includes loan products with a total cost of credit above 36 percent and where the creditor has access to repayment through a consumer’s account or paycheck, or a non-purchase money security interest in the consumer’s vehicle. The Proposal offers no evidence that longer-term loans – including those offered by community banks – with a total cost of credit over 36 percent are unfair and abusive while those loans under the threshold are not. Instead, the Proposal states with little supporting evidence that “the Bureau believes that a total cost of credit exceeding 36 percent per annum provides a useful line of demarcation.”²¹

The Bureau also does not adequately consider the impact of issuing the Proposal during an extended period of historically low interest rates. Interest rates will eventually increase and in a high interest rate environment, it may become significantly more difficult or even impossible to originate small-dollar loans that do not exceed the 36 percent threshold.

²⁰ 15 U.S.C. § 1012.

²¹ 81 Fed. Reg. 47,864, at 47,913 (July 22, 2016).

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While the Bureau indicates that loans with a total cost of credit exceeding a rate of 36 percent pose an increased risk, this falls short of the “substantial injury” test requirement under Section 1031 of the Dodd-Frank Act. Under that test, in addition to concluding that the act or practice will cause or is likely to cause substantial injury to a consumer, the Bureau must also conclude that any injury to consumers is not outweighed by any benefits to the consumer or to competition. The Bureau does not provide an analysis that these requirements are met, rather the Bureau attempts to justify its assertion by stating that a 36 percent threshold has been used in other contexts, including the Military Lending Act. It should be noted that the 36 percent threshold in the Military Lending Act and its implementing regulation is a statutory requirement that does not require a “substantial injury” test nor a benefits analysis. In fact, there is no such Congressional instruction for the regulation of small-dollar loans.

B. The 36 percent threshold for longer-term covered loans is a *de facto* usury limit in violation of the Dodd-Frank Act.

Dodd-Frank expressly prohibits the Bureau from establishing usury limits on extensions of credit:

No provision of this title shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law.²²

While the Proposal indicates the Bureau’s belief that the 36 percent total cost of credit threshold for longer-term covered loans is not a usury limit in violation of Dodd-Frank, the proposed requirements for covered loans are so onerous and costly, that the 36 percent threshold operates as a constructive usury limitation.

As explained elsewhere in this comment, underwriting and processing small-dollar loans is costly and at best marginally profitable for community banks. Complying with the onerous and prescriptive ATR and loan verification requirements, as well as the recordkeeping and payment transfer requirements will substantially increase the costs of providing covered loans for community banks. The increased cost and burden of making covered

²² 12 U.S.C. §5517(o).

loans would effectively prevent community banks and other lenders from serving this market, making the 36 percent threshold a *de facto* usury limit.

IX. The Proposal's anti-evasion clause is too subjective and does not provide needed compliance clarity.

Section 1041.19 of the Proposal contains an anti-evasion clause which states that “[a] lender must not take any action with the intent of evading the requirements of this part.” The Proposal attempts to clarify the meaning of when a lender action is taken with the intent of evading rule requirements. Specifically, the Proposal states that the form, characterization, label, structure or written documentation in connection with the lender’s action shall not be dispositive and rather the actual substance of the lender’s action, as well as other relevant facts and circumstances will determine whether evasion occurred.

The Proposal indicates that the anti-evasion clause was included due to concerns that a rule could not anticipate future lender conduct and some lenders may take steps to avoid regulatory restrictions on covered loans. In proposing the anti-evasion clause, the Bureau relies on its authority under Dodd-Frank section 1022(b)(1) which provides that the Bureau’s director may prescribe rules “as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.”

For the anti-evasion clause, the Proposal uses as its model certain Commodity Futures Trading Commission (CFTC) rules which defined and regulated swaps, swap agreements, and their associated record-keeping agreements.²³ Dodd-Frank directed the CFTC to issue that rule.²⁴ It should be noted that swaps are financial agreements between sophisticated parties and are not generally available to average consumers. There is simply no comparison between the market for swaps and small-dollar consumer loans and it is not appropriate to use regulations meant for sophisticated financial players as a model for consumer lending.

The mere existence of an anti-evasion clause will not only chill small-dollar lending, but will thwart the development of new innovative products and services. Community banks and other responsible lenders will not be able to identify which products, services, policies, procedures or actions would ultimately be considered an action intended to evade any requirements of the final rule. While

²³ 77 Fed. Reg. 48,208 (August 13, 2012).

²⁴ 15 U.S.C. §8302.

the Proposal does offer a few limited examples of what the Bureau considers evasion, there is no guarantee that other regulators will take the same view. In addition, and essentially implied by the Bureau, lender conduct that may be currently permissible under this provision may raise regulatory concerns in the future, subjecting lenders to sanction.

Considering these factors, ICBA strongly encourages the Bureau to remove the anti-evasion clause from any final rule. Such a broad and ambiguous provision only serves to cast a wide net across all lenders, including those responsible and committed to regulatory compliance. Additionally, given the unknown regulatory, financial, and reputational risks that would be prevalent with the proposed anti-evasion clause, community banks would not engage in new products or services that could potentially help the very consumers the Bureau is trying to protect.

X. Lenders should not be required to provide loan disclosures or other services for covered loans in languages other than English.

While the Proposal does not require that lenders take special steps or make information available in other languages to covered loan borrowers who possess limited English proficiency (LEP), it does seek input on whether there are any circumstances in which lenders should be required to provide the covered loan disclosures in a foreign language and, if so, the circumstance that should trigger such a requirement. ICBA strongly recommends that community banks not be required to provide loan disclosures or other information in languages other than English.

Under the Proposal, lenders would be allowed to provide the covered loan disclosures in a language other than English, provided that the disclosures are made available in English upon the consumer's request. Community banks and others that wish to serve LEP borrowers should be free to do so; however, requiring that disclosures be provided in languages other than English is yet another factor that will likely drive many community banks out of the small-dollar market due to the increased regulatory burden and compliance cost. Requiring disclosures in languages other than English would be extraordinarily costly for community banks that do not currently serve a high LEP community or do not employ a non-English speaking individual. To begin compliance with this onerous requirements, community banks would have to retain translation services, a print provider able to print in another language and verification services to ensure the disclosures comply with the rule requirements. Additionally, this costly and burdensome process would have to be undertaken for each language in which disclosures are provided – an impossible task if providing disclosures in the hundreds of languages other than English spoken in the United States.

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XI. Implementation Timeline

The Proposal indicates, in general, the final rule would become effective 15 months after publication of the final rule in the Federal Register. ICBA recommends that given experiences with similarly complicated regulations, such as the TILA RESPA Integrated Disclosure Rule, the Bureau should provide no less than 24 months from the date any final rule is published for the new lending requirements to go into effect. Any final rules that substantially change the core structure of a product or industry, such as the small-dollar market, would represent a sea change in the way all lenders originate and service these loans.

While ICBA has been clear that most community banks would cease offering covered loan products if the rule is finalized as proposed, any changes in originating, tracking, processing, and collecting on small-dollar loan products would be a lengthy process for community banks to implement. Furthermore, community banks are disproportionately impacted by regulatory burden because they do not have the advantage of economies of scale over which to spread regulatory costs. Without dedicated legal and compliance departments, community banks have to divert valuable staff from other duties, including serving customers, to implement new rules and other changes, a process that can be very lengthy depending on the complexity of the change and the bank processes impacted. Moreover, the Proposal's implementation burden would be even greater as it would require community banks to establish new and unique processes for these loans.

In recent years, community banks have experienced a sharply increasing regulatory burden. The nature of community banking is changing from lending to consumers in local communities to compliance with ever-increasing rules and guidance. Any additional requirements, as well as the requirements imposed cumulatively to implement new and revised regulations, significantly increase the time that compliance officers, managers and staff would have to spend to comply, and to document compliance, especially for small banks that already have staff performing multiple job functions. As an example, community banks' compliance resources will be heavily focused on implementing the new data collection and reporting requirements for the Home Mortgage Disclosure Act (HMDA) final rule through at least 2019.

XII. Conclusion

In closing, ICBA urges the Bureau to carefully consider ICBA's comments and recognize that community banks are an important source of safe and sustainable

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small-dollar credit for the consumers who need it most. The impact any additional requirements would have on community bank small-dollar lending would be extremely detrimental to consumers if community banks are forced from the small-dollar loan marketplace by onerous new regulations.

The options consumers will be left with could include unregulated and unlicensed predatory lenders. Given these factors, ICBA believes the Bureau must ensure that community banks have the needed flexibility to continue making small-dollar personal loans without new and undue regulatory burdens. That is why we are strongly encouraging the CFPB to provide an exemption from any final rule for community banks small-dollar lending.

Please contact Lilly Thomas, Lilly.Thomas@icba.org or Joe Gormley, Joseph.Gormley@icba.org, at (202) 659-8111 with any questions regarding our comments. We look forward to working with the Bureau on this important issue to ensure that community banks can continue to provide safe and sustainable access to small-dollar credit.

Sincerely,

/s/

Viveca Y. Ware
Executive Vice President
Regulatory Policy

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