BILLING CODE: 4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1041

[Docket No. CFPB-2019-0006]

RIN 3170-AA80

Payday, Vehicle Title, and Certain High-Cost Installment Loans

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final Rule.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this final rule to amend its regulations governing payday, vehicle title, and certain high-cost installment loans. Specifically, the Bureau is revoking provisions of those regulations that: provide that it is an unfair and abusive practice for a lender to make a covered short-term or longer-term balloon-payment loan, including payday and vehicle title loans, without reasonably determining that consumers have the ability to repay those loans according to their terms; prescribe mandatory underwriting requirements for making the ability-to-repay determination; exempt certain loans from the mandatory underwriting requirements; and establish related definitions, reporting, recordkeeping, and compliance date requirements. The Bureau is making these amendments to the regulations based on its re-evaluation of the legal and evidentiary bases for these provisions.

DATES: This rule is effective [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Joseph Baressi, Lawrence Lee, or Adam Mayle, Senior Counsels, Office of Regulations, at 202-435-7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Summary of the Rule

On November 17, 2017, the Bureau published a final rule (2017 Final Rule or Rule[1]) establishing consumer protection regulations for payday loans, vehicle title loans, and certain high-cost installment loans, relying on authorities under title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act).[2] The 2017 Final Rule addressed two discrete topics. First, the Rule contained a set of provisions with respect to the underwriting of covered short-term and longer-term balloon-payment loans, including payday and vehicle title loans, and related recordkeeping and reporting requirements.[3] These provisions are referred to herein as the "Mandatory Underwriting Provisions" of the 2017 Final Rule. Second, the Rule contained a set of provisions, applicable to the same set of loans and also to certain high-cost installment loans,[4] establishing certain requirements and limitations with respect to attempts to withdraw payments on the loans from consumers' checking or other accounts.[5] These provisions are referred to herein as the "Payment Provisions" of the 2017 Final Rule.

The Rule became effective on January 16, 2018, although most provisions (12 CFR 1041.2 through 1041.10, 1041.12, and 1041.13) had a compliance date of August 19, 2019.[6] On January 16, 2018, the Bureau issued a statement announcing its intention to engage in

---

[1] 82 FR 54472 (Nov. 17, 2017) (codified at 12 CFR part 1041).

[2] Public Law 111-203, 124 Stat. 1376 (2010).

[3] 12 CFR 1041.4 through 1041.6, 1041.10, 1041.11, and portions of 1041.12.

[4] The 2017 Final Rule refers to all three of these categories of loans together as covered loans. 12 CFR 1041.3(b).

[5] 12 CFR 1041.7 through 1041.9, and portions of 1041.12.

[6] 82 FR 54472, 54814.

rulemaking to reconsider the 2017 Final Rule.[7] A legal challenge to the Rule was filed on April 9, 2018, and is pending in the United States District Court for the Western District of Texas.[8] On October 26, 2018, the Bureau issued a statement announcing it expected to issue notices of proposed rulemaking to reconsider certain provisions of the 2017 Final Rule and to address the Rule's compliance date.[9]

On February 14, 2019, the Bureau published a notice of proposed rulemaking (2019 NPRM) to revoke the Mandatory Underwriting Provisions of the 2017 Final Rule.[10] The 2019 NPRM did not propose to amend the "Payment Provisions" of the 2017 Final Rule.

The Bureau is finalizing the amendments to the regulations as proposed in the 2019 NPRM. Specifically, the Bureau is revoking: (1) the "identification" provision, which states that it is an unfair and abusive practice for a lender to make covered short-term loans or covered longer-term balloon-payment loans without reasonably determining that consumers will have the ability to repay the loans according to their terms;[11] (2) the "prevention" provision, which establishes specific underwriting requirements for these loans to prevent the unfair and abusive

---

[7] *See* Bureau of Consumer Fin. Prot., *Statement on Payday Rule* (Jan. 16, 2018), https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/.

[8] *Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau*, No. 1:18-cv-295 (W.D. Tex. filed Apr. 9, 2018). On November 6, 2018, the court issued an order staying the August 19, 2019 compliance date of the Rule pending further order of the court. *See id.*, ECF No. 53. The litigation is currently stayed. *See id.*, ECF No. 66 (Dec. 6, 2019).

[9] *See* Bureau of Consumer Fin. Prot., *Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date* (Oct. 26, 2018), https://www.consumerfinance.gov/about-us/newsroom/public-statement-regarding-payday-rule-reconsideration-and-delay-compliance-date/.

[10] *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 84 FR 4252 (proposed Feb. 14, 2019). On the same day, the Bureau published a notice of proposed rulemaking to delay the compliance date for the Mandatory Underwriting Provisions of the 2017 Final Rule. *See Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date*, 84 FR 4298 (proposed Feb. 14, 2019). On June 17, 2019, the Bureau published a final rule delaying the compliance date for the Mandatory Underwriting Provisions. *See* 84 FR 27907 (June 17, 2019).

[11] 12 CFR 1041.4.

practice;[12] (3) the "principal step-down exemption" provision for certain covered short-term loans;[13] (4) the "furnishing" provisions, which require lenders making covered short-term or longer-term balloon-payment loans to furnish certain information regarding such loans to registered information systems (RISes) and create a process for registering such information systems;[14] (5) those portions of the recordkeeping provisions related to the mandatory underwriting requirements;[15] and (6) the portion of the compliance date provisions related to the mandatory underwriting requirements.[16] The Bureau also is revoking the Official Interpretations relating to these provisions. The Bureau is making these changes to the regulations based on a re-evaluation of the legal and evidentiary bases for these provisions.

The Bureau revokes the 2017 Final Rule's determination that it is an unfair practice for a lender to make covered short-term loans or covered longer-term balloon-payment loans without reasonably determining that consumers will have the ability to repay the loans according to their terms. For the reasons discussed below, the Bureau withdraws the Rule's determination that consumers cannot reasonably avoid any substantial injury caused or likely to be caused by the failure to consider a borrower's ability to repay.[17] The Bureau also determines that, even if the Bureau had not revoked its reasonable avoidability finding, the countervailing benefits to

[12] 12 CFR 1041.5.

[13] 12 CFR 1041.6.

[14] 12 CFR 1041.10 and 1041.11.

[15] 12 CFR 1041.12(b)(1) through (3).

[16] 12 CFR 1041.15(d).

[17] *See* 12 U.S.C. 5531(c)(1)(A).

consumers and competition in the aggregate from the identified practice would outweigh any relevant injury.[18]

Further, the Bureau revokes the 2017 Final Rule's determination that the identified practice is abusive. The Bureau determines that a lender's not considering a borrower's ability to repay does not take unreasonable advantage of particular consumer vulnerabilities.[19] The Bureau also withdraws the Rule's determination that consumers do not understand the materials risks, costs, or conditions of covered loans,[20] as well as its determination that consumers do not have the ability to protect their interests in selecting or using covered loans.[21]

II. Background

The SUPPLEMENTARY INFORMATION accompanying the 2017 Final Rule contains a more comprehensive description of the payday and vehicle title markets[22] and of the consumers who use these products.[23]

A. The Market for Short-Term and Balloon-Payment Loans

Consumers living paycheck to paycheck and with little to no savings often use credit as a means of coping with financial shortfalls.[24] These shortfalls may be due to mismatched timing between income and expenses, income volatility, unexpected expenses or income shocks, or

[18] *See* 12 U.S.C. 5531(c)(1)(B).

[19] *See* 12 U.S.C. 5531(d)(2).

[20] *See* 12 U.S.C. 5531(d)(2)(A).

[21] *See* 12 U.S.C. 5531(d)(2)(B).

[22] *See* 82 FR 54472, 54474-96.

[23] *Id.* at 54555-60.

[24] *Id.* at 54474.

expenses that simply exceed income.[25] According to a recent survey conducted by the Board of Governors of the Federal Reserve System (Board), one-quarter of adults are either just getting by or finding it difficult to get by; a similar percentage skipped necessary medical care in 2018 due to being unable to afford the cost. In addition, nearly 40 percent of adults reported they would either be unable to cover an emergency expense costing $400 or would have to sell something or borrow money to cover it.[26] Whatever the cause of these financial shortfalls, consumers in these situations sometimes seek what may broadly be termed a "liquidity loan."

The Mandatory Underwriting Provisions focus specifically on short-term loans and a smaller market segment of longer-term balloon-payment loans. The largest categories of short-term loans are "payday loans," which are generally short-term loans required to be repaid in a lump-sum single payment on receipt of the borrower's next income payment, and short-term vehicle title loans, which are also almost always due in a lump-sum single payment, typically within 30 days after the loan is made.[27]

---

[25] *Id.* (citing Rob Levy & Joshua Sledge, *A Complex Portrait: An Examination of Small-Dollar Credit Consumers* (Ctr. for Fin. Servs. Innovation 2012), *https://www.fdic.gov/news/conferences/consumersymposium/2012/A%20Complex%20Portrait.pdf*).

[26] Bd. of Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S. Households in 2018*, at 5, 23 (May 2019), *https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf*; and Bd. of Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S. Households in 2018, Appendix A: Survey Questionnaire*, *https://www.federalreserve.gov/publications/appendix-a-survey-questionnaire.htm*. The 2016 survey relied upon in the 2017 Final Rule found that 44 percent of adults could not cover an emergency expense costing $400 or would cover it by selling something or borrowing money. *See* 82 FR 54472, 54474 & n.9 (citing Bd. of Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S. Households in 2016*, at 2, 8 (May 2017), *https://www.federalreserve.gov/publications/files/2016-report-economic-well-being-us-households-201705.pdf*).

[27] 82 FR 54472, 54475.

1. Payday Loans

Eighteen States and the District of Columbia prohibit payday lending or impose interest rate caps that most payday lenders find too low to enable them to make such loans profitably.[28] The remaining 32 States have either created a carve-out from their general usury caps for payday loans or do not regulate loan interest rates.[29] Several States that previously authorized payday lending have, over the past several years, changed their laws to restrict payday lending.[30] The

[28] These jurisdictions are Arizona, Arkansas, Colorado, Connecticut, Georgia, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Dakota, Vermont, West Virginia, and Washington, D.C. Ariz. Rev. Stat. section 6-632; Ark. Const. art. XIX, § 13; *see* Colo. Legislative Council Staff, *Initiative #126 Initial Fiscal Impact Statement*, https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2017-2018/126FiscalImpact.pdf; *see also* Colo. Sec'y of State, *Official Certified Results—State Offices & Questions,* https://results.enr.clarityelections.com/CO/91808/Web02-state.220747/#/c/C_2 (Proposition 111); Conn. Gen. Stat. 36a-558(d); Ga. Code Ann. 16-17-8; Md. Code Ann. Com. Law 12-306(a)(2)(i); 209 Mass. Regs. Code tit. 209, 26.01; Mont. Code Ann. 31-1-722(2); N.H. Rev. Stat. 399-A:13(XX); N.J. Stat. Ann. 2C:21-19; 2017 N.M. Laws ch. 110 (H.B. 347); N.Y. Penal Law 190.40; N.C. Gen. Stat. 53-281; Ohio Rev. Code Ann. 1321.35 to 1321.48; 7 Pa. Cons. Stat. Ann. 6201 to 6219; S.D. Codified Laws 54-4-44, as amended by Initiated Measure 21 2 (Nov. 8, 2016); Vt. Stat. Ann. tit. 9, 41a; W. Va. Code 32A-3-1(e), 46A-4-107 to 46A-4-113; District of Columbia Laws 17-42 (Act 17–115) 2 (Nov. 24, 2007).

[29] *See, e.g.*, 82 FR 54472, 54477 & n.25. The 2017 Final Rule cited New Mexico and Ohio as payday authorizing States. At the time the rule was issued, New Mexico had enacted a law which had not yet taken effect, prohibiting short-term payday lending. As of April 27, 2019, Ohio effectively prohibited short-term payday and bans vehicle title lending. New Mexico and Ohio are no longer counted as payday authorizing States. *See* Ohio House Bill 123, *An Act to Modify the Short-Term Loan Act*, https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-123; https://www.com.ohio.gov/documents/fiin_HB123_Guidance.pdf. Oklahoma for purposes of this rulemaking is counted as a payday-authorizing State, but SB 720 established August 1, 2020 as the date after which payday loans are banned. Loans of $1,500 or less must have a minimum loan term of 60 days, be repaid in fully amortizing payments of substantially equal amounts, and carry maximum fees of 17 percent per month plus database verification fees, http://www.oklegislature.gov/BillInfo.aspx?Bill=sb720&Session=1800. After August 1, 2020, references herein to Oklahoma law may not be applicable. In addition, in 2021, Virginia will no longer be counted as a payday-authorizing State when HB 789 takes effect. Among other things, the bill sets a four month minimum loan term for "short-term" loans, https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB789&201+sum+HB789.

[30] *See, e.g.*, 82 FR 54472, 54485-86. In addition to New Mexico and Ohio, voters in Colorado approved a ballot initiative on November 6, 2018, to cap annual percentage rates (APRs) on payday loans at 36 percent. This initiative took effect February 1, 2019, shortly before the release of the 2019 NPRM. Colorado is counted here as a State that prohibits short-term payday lending. *See* Colo. Legislative Council Staff, *Initiative #126 Initial Fiscal Impact Statement*, https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2017-2018/126FiscalImpact.pdf; *see also* Colo. Sec'y of State, *Official Certified Results—State Offices & Questions,* https://results.enr.clarityelections.com/CO/91808/Web02-state.220747/#/c/C_2 (Proposition 111). Until the ballot initiative, Colorado law required that payday loans have a six-month minimum loan term. Colo. Rev. Stat. 5-3.1-103. There was no prohibition on lenders making a single-installment loan due in six months, but all payday lenders reported that they offered only installment loans. 4 Colo. Code Regs. 902-1, Rule 17(B) (2010); State of Colorado, Dep't of Law, *2016 Deferred Deposit/Payday Lenders Annual Report*, question 10, https://coag.gov/office-sections/

States that do permit payday lending have enacted a wide variety of regulations on payday lending practices—including limits on price, or loan term, all of which reflect the judgments of the various States.[31] While a few States have enacted general requirements that payday lenders consider a borrower's ability to repay or set loan-to-income percentages,[32] no State has adopted mandatory underwriting requirements for payday loans that are similar to those in the 2017 Final Rule.

The primary channel through which consumers obtain payday loans, as measured by total dollar volume, is through State-licensed storefront locations, although the share of online loan volume has grown while storefront loan volume has continued to decline. There were an estimated 13,700 storefronts in 2018, down from the industry's peak of over 24,000 stores in 2007.[33] The decline was due to several factors including industry consolidation, changes in State laws, increased consumer demand for alternative products such as installment loans, and a shift to greater online lending.[34]

---

consumer-protection/consumer-credit-unit/uniform-consumer-credit-code/general-information/. As described in note 29 above, Oklahoma will, as of August 1, 2020, prohibit payday lending In addition, as of January 1, 2020, California caps rates on installment loans of $2,500 to $10,000 at 36 percent plus the Federal Funds Rate, https://dbo.ca.gov/2019/12/11/new-requirements-for-cfl-licensees/. California caps rates on smaller installment loans up to $2,500 at 30 percent APR, depending on the loan amount, and also caps payday loan fees as noted above. *See* Cal. Fin. Code section 9:22303.

[31] *See* 84 FR 4252, 4254.

[32] *See* 82 FR 54472, 54480-81, 54491. Community Financial Services of America, a trade association representing payday and small-dollar lenders, includes among its best practices that its members should, before extending credit, "undertake a reasonable, good-faith effort to determine a customer's creditworthiness and ability to repay the loan." *See* Cmty. Fin. Servs. of Am., *Best Practices for the Small-Dollar Loan Industry*, https://www.cfsaa.com/files/files/CFSA-BestPractices.pdf (last visited Apr. 28, 2020).

[33] *See* John Hecht, *State of the Industry: Innovating and Adapting Amongst a Complex Backdrop* (Mar. 2019) (Jefferies LLC, slide presentation) (on file) (Hecht 2019). In the 2017 Final Rule, the Bureau cited the same analyst's estimate of 16,480 payday storefronts in 2015. *See* 82 FR 54472, 54480 & n.53.

[34] Hecht 2019.

From 2009 to 2014, storefront payday lending generated approximately $30 billion in new loans per year; by 2018 the volume had declined to $15 billion,[35] although these numbers may include products other than single-payment loans. Combined storefront and online payday loan volume was $30.5 billion in 2017 and $29.2 billion in 2018,[36] down from a peak of about $50 billion in 2007.[37] The online payday loan industry generates about 50 percent of total payday loan revenue.[38] In 2018, storefront industry revenue (fees paid on payday loans) was $2.1 billion.[39] Combined storefront and online payday revenue was estimated at $4.8 billion in 2017 and $4.6 billion in 2018,[40] down from a peak of over $9 billion in 2012.[41] Reports from several States and publicly traded companies offering payday loans show a shift from payday loans to small-dollar installment loans and other credit products. For example, California and Texas payday loan volume decreased approximately 35 percent from 2015 to 2018; there was a corresponding increase in installment loan volume (of amounts at or below $2,500) of approximately 35 percent over the same period.[42] Two publicly traded companies offering payday loans reported a significant decrease in the percent of revenue contributed by single-

---

[35] *See id.*

[36] *See id.*

[37] John Hecht, *The State of Short-Term Credit Amid Ambiguity, Evolution and Innovation* (2016) (Jefferies LLC, slide presentation) (on file) (Hecht 2016).

[38] *See* 82 FR 54472, 54487; Hecht 2016.

[39] *See* Hecht 2019.

[40] *See id.*

[41] Hecht 2016.

[42] Calculations were based on total reported volume of single payment transactions and installment transactions for amounts less than $2,500. *See* California Dep't of Bus. Oversight, *California Department of Business Oversight Annual Report and Industry Survey: Operation of Payday Lenders Licensed Under the California Deferred Deposit Transaction Law* for 2015 through 2018, https://dbo.ca.gov/payday-lenders-publications/ and Texas Office of Consumer Credit Comm'r, *Credit Access Business Annual Data Report* for 2015 through 2018, https://occc.texas.gov/publications/activity-reports.

payment or short-term credit products and simultaneous substantial increases in percent of revenue contributed by other credit products.[43]

When the 2019 NPRM was issued, there were at least 12 payday lenders with approximately 200 or more storefront locations,[44] and, despite the storefront decline, these lenders continue to have significant market share.[45] The Bureau estimated in 2017 that over 2,400 storefront payday lenders are small businesses as defined by the Small Business Administration (SBA);[46] the number of storefront payday lenders classified as small businesses has likely declined to some extent, continuing the trend noted over the last several years.[47]

Estimates of the number of consumers who use payday loans annually range from 2.2 million households[48] to 12 million individuals.[49] Given the number of storefronts and the

---

[43] At Enova International, a publicly traded online lender, revenue from installment, line of credit, and receivables purchase agreement (small business) products rose from 2 percent to 89 percent from 2009 to 2019, while short-term loan revenue fell from 98 percent to 11 percent. Similarly, at CURO, revenue from installment and open-end line-of-credit products rose from 19 percent to 78 percent from 2010 to 2019. *See* Enova Int'l, *Investor Presentation: November 2019*, at 9 (Nov. 2019), *http://ir.enova.com/download/Enova+Investor+Presentation+%2811-6-2019%29+-+FINAL.pdf* and CURO Group, *November 2019: Stephens Investment Conference*, at 7 (Nov. 13, 2019), *https://ir.curo.com/~/media/Files/C/Curo-IR/reports-and-presentations/stephens-conference-november-2019.pdf*.

[44] 84 FR 4252, 4255.

[45] *See* Hecht 2019.

[46] 82 FR 54472, 54479 & n.52.

[47] *See id.* at 54480 & n.53.

[48] *See* Fed. Deposit Ins. Corp., *2017 FDIC National Survey of Unbanked and Underbanked Households*, at 41 (Oct. 2018), *https://www.fdic.gov/householdsurvey/2017/2017report.pdf* (FDIC 2017 Survey). This is a reduction from the 2015 numbers of 2.5 million households cited in the 2017 Final Rule; *see* 82 FR 54472, 54479 & n.42 (citing Fed. Deposit Ins. Corp., *2015 FDIC National Survey of Unbanked and Underbanked Households*, at 2, 34 (Oct. 20, 2016), *https://www.fdic.gov/householdsurvey/2015/2015report.pdf*). The FDIC used the United States Census Bureau's definition of "household" in the Current Population Survey. *See* FDIC 2017 Survey at 73; *https://www.census.gov/programs-surveys/cps/technical-documentation/subject-definitions.html#household*.

[49] 82 FR 54472, 54479 & n.44 (citing Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why*, at 4 (July 2012), *http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf*.).

average number of customers per storefront plus the presence of the large online market for payday loans, the actual number of borrowers appears closer to the higher end of the estimates.[50]

A small percentage of the up to 12 million consumers who take out payday loans each year complain to the Bureau about them. In 2016, for example, the Bureau handled approximately 4,400 complaints in which consumers reported "payday loan" as the complaint product.[51] The Bureau received approximately 2,900 payday loan complaints in 2017, approximately 2,300 in 2018, and approximately 2,100 in 2019.[52] Consumers have complained most frequently about unexpected fees or interest associated with payday loans and in the last two years frequently selected the category "struggling to pay your loan."[53]

---

[50] Community Financial Services of America, a trade association representing payday and small-dollar lenders, states that approximately 12 million Americans use small-dollar loans each year. *See* https://www.cfsaa.com/ (last visited Apr. 28, 2020). The 2017 Final Rule pointed to one study estimating, based on administrate State data from three States, that the average payday store served around 500 customers per year. 82 FR 54472, 54480 & n.59 (citing Pew Charitable Trusts, *Payday Lending in America: Policy Solutions*, at 18 (Report 3, 2013), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2013/pewpaydaypolicysolutionsoct2013pdf.pdf).

[51] Bureau of Consumer Fin. Prot., *Consumer Response Annual Report, Jan. 1–Dec. 31, 2016*, at 33 (Mar. 2017), https://www.consumerfinance.gov/documents/3368/201703_cfpb_Consumer-Response-Annual-Report-2016.pdf.

[52] Bureau of Consumer Fin. Prot., *Consumer Response Annual Report, Jan. 1–Dec. 31, 2017*, at 34 (Mar. 2018), https://www.consumerfinance.gov/documents/6406/cfpb_consumer-response-annual-report_2017.pdf; Bureau of Consumer Fin. Prot., *Consumer Response Annual Report, Jan. 1–Dec. 31, 2018*, at 62 (Mar. 2019), https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2018.pdf; Bureau of Consumer Fin. Prot., *Consumer Response Annual Report, Jan. 1–Dec. 31, 2019,* at 62 (Mar. 2020), https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2019.pdf. To provide a sense of the number of complaints for payday loans relative to the number of complaints for other product categories, in 2019, approximately 0.6 percent of all consumer complaints the Bureau received were about payday loans, and 0.2 percent were about vehicle title loans. Bureau of Consumer Fin. Prot., *Consumer Response Annual Report, Jan. 1–Dec. 31, 2019,* at 9 (Mar. 2020), https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2019.pdf. There is some overlap across product categories, for example, a consumer complaining about the conduct of a debt collector seeking to recover on a payday loan would be in the debt collection product category rather than the payday loan product category.

[53] Bureau of Consumer Fin. Prot., *Consumer Response Annual Report, Jan. 1–Dec. 31, 2018*, at 64 (Mar. 2019), https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2018.pdf; Bureau of Consumer Fin. Prot., *Consumer Response Annual Report, Jan. 1–Dec. 31, 2019,* at 64 (Mar. 2020), https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2019.pdf.

2. Single-Payment Vehicle Title Loans

The second major category of loans covered by the Mandatory Underwriting Provisions is single-payment vehicle title loans. As with payday loans, the States have taken different regulatory approaches with respect to single-payment vehicle title loans. Sixteen States permit single-payment vehicle title lending at rates that vehicle title lenders will offer under their business models.[54] Another six States permit only title installment loans but those loans are not affected by the Mandatory Underwriting Provisions.[55] Three States (Arizona, Georgia, and New Hampshire) permit single-payment vehicle title loans but prohibit or substantially restrict payday loans.[56] Although a few States have enacted general requirements that single-payment vehicle title lenders consider a borrower's ability to repay or set loan-to-income percentages,[57] no State has adopted mandatory underwriting requirements for single-payment vehicle title loans that are similar to those in the 2017 Final Rule.

Information about the vehicle title market is more limited than that available for the storefront payday industry.[58] According to a 2015 report, there were approximately 8,000 title

---

[54] Alabama, Mississippi, New Hampshire, Oregon, and Tennessee authorize single-payment title lending and Arizona, Delaware, Georgia, Idaho, Louisiana, Minnesota, Missouri, Nevada, Texas, Utah, and Wisconsin authorize both single-payment or installment title lending. *See* Pew Charitable Trusts, *Auto Title Loans—Market Practices and Borrowers' Experiences* (2015), *https://www.pewtrusts.org/~/media/assets/2015/03/autotitleloansreport.pdf* (updated to reflect State law changes since 2015) (Pew Auto Title Loans). As noted in the 2017 Final Rule, New Mexico enacted a law in 2017, effective January 1, 2018, that prohibits single-payment vehicle title loans and allows only installment title lending. *See* 82 FR 54472, 54490. As of April 27, 2019, Ohio prohibits lenders from making loans of $5,000 or less secured by a vehicle title or any other collateral. *See https://www.com.ohio.gov/documents/fiin_HB123_Guidance.pdf*; *see also* Ohio House Bill 123, *An Act to Modify the Short-Term Loan Act*, *https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-123*.

[55] *See* 82 FR 54472, 54490. *See also* Pew Auto Title Loans (updated to reflect State law changes since 2015 by adding New Mexico).

[56] *Id.*

[57] *See* 82 FR 54472, 54491.

[58] *Id.*

loan storefront locations in the United States, about half of which also offered payday loans.[59] Of the locations that predominantly offered vehicle title loans in 2017, three privately held firms dominated the market and together accounted for approximately 2,500 stores in over 20 States.[60] In addition to the large title lenders, in 2017 there were about 800 vehicle title lenders that were small businesses as defined by the SBA.[61]

Estimates of the number of consumers who use vehicle title loans annually have ranged from 1.8 million households to 2 million adults, although these estimates do not necessarily differentiate between users of single-payment and installment vehicle title loans.[62] The demographic profiles of vehicle title borrowers appear to be comparable to the demographics of payday borrowers, which is to say that they tend to be lower and moderate income.[63]

As with payday loans, a small percentage of the estimated two million consumers who take out vehicle title loans each year file complaints with the Bureau. In 2019, the Bureau received approximately 530 complaints involving vehicle title loans, down 7 percent from 2018.[64] In 2019, consumers most frequently complained about unexpected fees or interest and

---

[59] *See id.* at 54491 & n.197 (citing Pew Charitable Trusts, *Auto Title Loans—Market practices and borrowers' experiences*, at 1 (2015), *https://www.pewtrusts.org/~/media/assets/2015/03/autotitleloansreport.pdf*.

[60] 82 FR 54472, 54492; *see also* https://www.midwesttitleloans.net/SiteMap, *https://www.northamericantitleloans.net/SiteMap* (last visited Apr. 28, 2020). Store counts for these three firms may include States with stores that offer installment vehicle title loans.

[61] 82 FR 54472, 54492 & n.200 (explaining that State reports have been supplemented with estimates from Center for Responsible Lending, revenue information from public filings, and from non-public sources). *See* Jean Ann Fox *et al.*, *Driven to Disaster: Car-Title Lending and Its Impact on Consumers*, at 7 (Consumer Fed'n of Am. & Ctr. for Responsible Lending (2013), *https://www.responsiblelending.org/other-consumer-loans/car-title-loans/research-analysis/CRL-Car-Title-Report-FINAL.pdf*.).

[62] FDIC 2017 Survey at 41. The number of households using vehicle title loans in the 2017 FDIC survey rose from the 1.7 million households reported in the 2015 survey cited in the 2017 Final Rule. The individual user estimate is from a 2015 report. *See* Pew Auto Title Loans at 33; 82 FR 54472, 54491 & n.195.

[63] FDIC 2017 Survey (calculations made using custom data tool).

[64] Bureau of Consumer Fin. Prot., *Consumer Response Annual Report, Jan. 1–Dec. 31, 2019*, at 67 (Mar. 2020), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2019.pdf*. The vehicle title

struggling to pay their vehicle title loans.[65] Vehicle title loan complaints made up 0.2 percent of all consumer complaints the Bureau received in 2019.[66]

3. Longer-Term Balloon-Payment Loans

The third category of loans covered by the Mandatory Underwriting Provisions is longer-term balloon-payment loans which generally involve a series of small, often interest-only, payments followed by a single larger lump sum payment.[67] There does not appear to be a large market for such loans. However, in the preamble to the 2017 Final Rule, the Bureau expressed the concern that the market for these longer-term balloon-payment loans, with structures similar to payday loans that pose similar risks to consumers, might grow if only covered short-term loans were regulated under the 2017 Final Rule.[68] Because the market was relatively small, the Bureau supplemented its analysis of these loans by using relevant information on related types of covered longer-term loans, such as hybrid payday loans, payday installment loans, and vehicle title installment loans.[69] The profile of borrowers in the market for longer-term balloon-payment loans is similar to those seeking covered short-term and vehicle title loans—they also generally have low average incomes, poor credit histories, and recent credit-seeking activity.[70]

---

category may include complaints about both single payment and installment vehicle title loans. In addition, there is some overlap across product categories; a consumer complaining about debt collection on a vehicle title loan would be in the debt collection product category rather than the vehicle title loan product category.

[65] *Id.* at 69.

[66] *Id.* at 9.

[67] 82 FR 54472, 54475. For examples of longer-term balloon-payment loans, *see id.* at 54486 & n.143, 54490 & n.179.

[68] *Id.* at 54472, 54527-28.

[69] *Id.* at 54580.

[70] *Id.* at 54581.

4. Short-Term Lending by Depository Institutions

Since the issuance of the 2017 Final Rule, prudential regulators have released additional regulations and guidance on small-dollar lending by depository institutions. On October 5, 2017, the Office of the Comptroller of the Currency (OCC) rescinded its November 2013 "Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products."[71] From its market monitoring activities, the Bureau is aware that at least one large bank has reopened its deposit advance products to new customers. On May 23, 2018, the OCC issued a bulletin encouraging banks "to offer responsible short-term, small-dollar installment loans, typically two to 12 months in duration with equal amortizing payments, to help meet the credit needs of consumers."[72] From its market monitoring activities, the Bureau is aware that since the release of the OCC's bulletin, at least one large bank is offering a short-term, small-dollar installment lending product. On November 14, 2018, the Federal Deposit Insurance Corporation (FDIC) issued a request for information on small-dollar lending "to encourage FDIC-supervised institutions to offer small-dollar credit products that are responsive to customers' needs and that are underwritten and structured prudently and responsibly."[73]

In addition, on October 1, 2019 the National Credit Union Administration (NCUA) published a rule expanding its original Payday Alternative Loan (PAL) program with a new program referred to as "PALs II" "to encourage responsible lending [by Federal credit unions]

---

[71] OCC News Release 2017-118, *Acting Comptroller of the Currency Rescinds Deposit Advance Product Guidance* (Oct. 5, 2017), https://www.occ.treas.gov/news-issuances/news-releases/2017/nr-occ-2017-118.html.

[72] OCC Bulletin 2018-14, *Installment Lending: Core Lending Principles for Short-Term, Small-Dollar Installment Lending* (May 23, 2018), https://www.occ.gov/news-issuances/bulletins/2018/bulletin-2018-14.html.

[73] Fed. Deposit Ins. Corp., *Financial Institution Letters: Request for Information on Small-Dollar Lending* (Nov. 14, 2018), https://www.fdic.gov/news/news/financial/2018/fil18071.html.

that allows consumers to address immediate needs while working towards fuller financial inclusion."[74] The PALs II rule, effective December 2, 2019, authorizes Federal credit unions to offer small-dollar loans with larger loan amounts and longer loan terms than were available under the original PALs rule, removes the membership tenure requirement, and limits Federal credit unions to one type of PALs loan at a time. The other requirements of the original PAL rule apply to PALs II.[75]

The 2017 Final Rule establishes a safe harbor under the conditional exemption for alternative loans for Federal credit unions' original PALs loans.[76] The conditional exemption is, by its terms, limited to original PALs loans. If Federal credit unions structure PALs II to be substantially repaid within 45 days, PALs II could be covered loans under the 2017 Final Rule. However, Federal credit unions are unlikely to structure PALs II loans to be repaid within 45 days as PALs II are generally designed for larger loan amounts of up to $2,000 and must fully amortize over the life of the loan.[77] Consequently, it is highly unlikely that PALs II meet the definition of covered short-term loans under the 2017 Final Rule or are subject to its Mandatory Underwriting Provisions. In addition, the Payment Provisions of the 2017 Final Rule do not apply to PALs II with loan terms longer than 45 days due to the NCUA's 28 percent interest rate limitation on PALs II loans.[78]

---

[74] 84 FR 51942 (Oct. 1, 2019); Nat'l Credit Union Admin., Press Release, *Payday Alternative Loan Rule Will Create More Alternatives for Borrowers* (Sept. 2019), https://www.ncua.gov/newsroom/press-release/2019/payday-alternative-loan-rule-will-create-more-alternatives-borrowers.

[75] 84 FR 51942, 51950-52.

[76] *See* 12 CFR 1041.3(e)(4), 84 FR 51942, 54873-74.

[77] *See* 12 CFR 701.21(c)(7)(iv)(A)(1) and (5). PALs II may also meet the 2017 Final Rule's conditional exemption for accommodation loans in 12 CFR 1041.3(f).

[78] *See* 12 CFR 1041.2(a)(7) and 1041.3(b)(2). The NCUA also authorizes an application fee of up to $20 on both types of PALs. 12 CFR 701.21(c)(7)(iii)(A) and (iv)(A). Under the Truth in Lending Act, an application fee

The Bureau is of course aware of the COVID-19 pandemic and its economic effects. On March 26, 2020, in response to the pandemic, the Bureau and four other Federal regulators issued a joint statement encouraging banks, savings associations, and credit unions to offer responsible small-dollar loans including closed-end installment loans, open-end lines of credit, and appropriately structured single-payment loans.[79] The statement also recognized that in ordinary circumstances small-dollar loans may be beneficial to consumers to address unexpected expenses or temporary income shortfalls.[80] The joint statement's analysis of responsible small-dollar lending is distinct from the analysis in this rulemaking and the determinations herein with respect to the 2017 Final Rule. The Bureau's analysis or determinations in this final rule do not rely in any way on either the occurrence of the pandemic or its economic effects.

On May 20, 2020, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency issued joint small-dollar loan lending principles for purposes of their oversight of banks, savings associations, and credit unions under their authorities. The

---

charged to all applicants, whether or not credit is extended, is exempt from the finance charge and APR calculation. 12 CFR 1026.4(c)(1). If in the future the NCUA increases the permitted PALs II rate above 36 percent APR, potentially bringing PALs II within the scope of the Payment Provisions, PALs II may qualify for other exemptions. *See* 12 CFR 1041.3(f) (conditional exemption for accommodation loans) and 1041.8(a)(1)(ii) (conditional exclusion for certain transfers by account-holding institutions).

[79] Bd. of Governors of the Fed. Reserve Sys., Bureau of Consumer Fin. Prot., Fed. Deposit Ins. Corp., Nat'l Credit Union Admin., Office of the Comptroller of the Currency, *Joint Statement Encouraging Responsible Small-Dollar Lending in Response to COVID-19* (Joint Statement), https://files.consumerfinance.gov/f/documents/cfpb_interagency-statement_small-dollar-lending-covid-19_2020-03.pdf. The agencies also stated that the loans should be consistent with safety and soundness, treat consumers fairly, and comply with applicable statutes and regulations, including consumer protection laws.

[80] *Id.*

analysis of those agencies is distinct from the Bureau's analysis in this final rule under its statutory authorities.[81]

On May 22, 2020, the Bureau issued a No-Action Letter (NAL) template to the Bank Policy Institute under its innovation policies that insured depository institutions may use to apply for a NAL covering their small-dollar credit products. The template is intended to further competition in the small-dollar lending space and facilitate robust competition that fosters access to credit.[82]

B. The Mandatory Underwriting Provisions of the 2017 Final Rule

Section 1041.4 contains an identification provision which provides that it is an unfair and abusive practice for a lender to make covered short-term loans or covered longer-term balloon-payment loans without reasonably determining that consumers have the ability to repay the loans according to their terms. The preamble to the 2017 Final Rule sets out the legal reasoning and factual analysis in support of the unfairness and abusiveness findings to § 1041.4.[83]

Section 1041.5 contains a detailed and extensive set of underwriting requirements adopted to prevent the unfair and abusive practice. Specifically, § 1041.5(c)(2) requires lenders making covered short-term or longer-term balloon-payment loans to obtain a written statement from the consumer with respect to the consumer's net income and major financial obligations; obtain verification evidence of the consumer's income, if reasonably available, and major financial obligations; obtain a report from a national consumer reporting agency and a report

---

[81] Bd. of Governors of the Fed. Reserve Sys., Fed. Deposit Ins. Corp., Nat'l Credit Union Admin., Office of the Comptroller of the Currency, *Federal agencies share principles for offering Responsible Small-Dollar Loans* (May 2020), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200520a.htm.

[82] Bureau of Consumer Fin. Prot., *CFPB Takes Action to Help Struggling Homeowners Seeking Mitigation Efforts; Consumers Seeking Small-Dollar Loans* (May 2020), https://www.consumerfinance.gov/about-us/newsroom/cfpb-helps-struggling-homeowners-seeking-mitigation-efforts-consumers-seeking-small-dollar-loans/.

[83] 82 FR 54472, 54553-624.

from a registered information system with respect to the consumer; and review its own records and the records of its affiliates for evidence of the consumer's required payments under any debt obligations. Using these inputs, the lender is generally required pursuant to § 1041.5(b) and (c)(1) to make a reasonable projection of the consumer's net income and payments for major financial obligations over the ensuing 30 days; calculate either the consumer's debt-to-income ratio or the consumer's residual income; estimate the consumer's basic living expenses; and determine based upon the debt-to-income or residual income calculations whether the consumer will be able to make the payments for his or her payment obligations and the payments under the covered loan and still meet the consumer's basic living expenses during the term of the loan and for a period of 30 days thereafter.[84]

This determination is required each time a consumer returns to take out a new loan, although pursuant to § 1041.5(c)(2)(ii)(D) the lender generally need not obtain a new national credit report if one was obtained within the prior 90 days. If a consumer has obtained three loans each within 30 days of the prior loan, pursuant to § 1041.5(d)(2) the lender cannot make another covered short-term or longer-term balloon-payment loan for a period of 30 days.

As also noted above, § 1041.6 contains a principal step-down exemption that allows lenders to make covered short-term loans without an ability-to-repay determination under § 1041.5. In order to qualify for the principal step-down exemption pursuant to § 1041.6(b)(1)(i), the principal cannot exceed $500 for the first in a sequence of covered short-term loans, and pursuant to § 1041.6(b)(3) the principal step-down exemption is not available for vehicle title loans. A lender may not make more than three loans in succession under this principal step-down exemption and the loans must provide for a "principal step-down" over the

[84] The Rule defines "basic living expenses" and "major financial obligations." 12 CFR 1041.5(a)(1) and (3).

sequence pursuant to § 1041.6(b)(1)(ii) and (iii) such that the second loan in a sequence can be for only two-thirds of the amount of the initial loan and the third loan in a sequence for one-third of the initial loan amount.

Pursuant to § 1041.6(c)(1), a lender cannot make a loan under the principal step-down exemption to a consumer who has had an outstanding covered short-term or longer-term balloon-payment loan in the preceding 30 days. Pursuant to § 1041.6(c)(3), the lender also cannot make a loan that would result in the consumer having more than six covered short-term loans outstanding during any consecutive 12-month period or result in the consumer being in debt on any covered short-term loans for longer than 90 days in any consecutive 12-month period. To verify the consumer's eligibility, before making a conditionally exempt covered short-term loan pursuant to § 1041.6(a), the lender must review the consumer's borrowing history in its own records and those of its affiliates and obtain a report from a Bureau-registered information system to determine a potential loan's compliance with § 1041.6(b) and (c).

Lenders making covered short-term and longer-term balloon-payment loans—including conditionally exempt covered short-term loans—generally are required to furnish certain information on those loans to every registered information system that has been registered with the Bureau for 180 days or more. Pursuant to § 1041.10(c)(1), certain information must be furnished no later than the date on which the loan is consummated or as close in time as feasible thereafter; pursuant to § 1041.10(c)(2), updates to such information must be furnished within a reasonable period after the event that requires the update.

In adopting the Mandatory Underwriting Provisions in 2017, the Bureau considered and rejected a number of alternatives, including requiring disclosures, adopting a payment-to-income ratio requirement, adopting one of the various State law approaches to regulating short-term loans (such as rollover caps, less detailed ability-to-repay frameworks, complete bans on short-term lending products), and other suggestions from commenters. A comprehensive description of the Bureau's consideration and treatment of these alternatives is set forth in the 2017 Final Rule.[85]

III. Outreach

In developing the 2019 NPRM, the Bureau took into account the input it received from stakeholders through its efforts to monitor and support industry implementation of the 2017 Final Rule, as well as comments received in response to other Bureau initiatives, such as a series of requests for information the Bureau published in 2018.[86] The Bureau also held a series of briefing calls with various government, industry, and consumer group stakeholders on the 2019 NPRM.

Interagency Consultation. As discussed in connection with section 1022(b)(2) of the Dodd-Frank Act below, the Bureau's outreach included consultation with other Federal consumer protection and prudential regulators, and their feedback has assisted the Bureau in preparing this final rule.

Consultation with State and Local Officials. The Bureau's outreach has included calls with State attorneys general, State financial regulators, and organizations representing the officials charged with enforcing applicable Federal, State, and local laws on small-dollar loans.

Tribal Consultation. On December 19, 2018, the Bureau held a consultation with representatives from a number of Indian tribes about what it might address in its proposed rulemaking. Federally recognized Indian tribes were invited to participate in this consultation.

---

[85] *See* 82 FR 54472, 54636-40.

[86] *See* Bureau of Consumer Fin. Prot., *Calls for Evidence*, https://www.consumerfinance.gov/policy-compliance/notice-opportunities-comment/archive-closed/call-for-evidence/ (lasted visited Mar. 12, 2020).

On March 13, 2020, the Bureau held a consultation regarding the finalization of the 2019 NPRM. Federally recognized Indian tribes were invited to participate in this consultation.

Public Comments. The Bureau received approximately 197,000 comments on the 2019 NPRM. All comments have been posted to the public docket for this rulemaking.[87] These comments included several hundred detailed comments from consumer groups, trade associations, non-depository lenders, banks, credit unions, research and advocacy organizations, members of Congress, industry service providers, fintech companies, Tribal leaders, faith leaders and coalitions of faith leaders, and State and local government officials and agencies. The Bureau allowed into the docket and considered comments received after the comment period had closed.

The Bureau did not tally precisely comments supporting or opposing the 2019 NPRM. A minority of comments were hard to categorize as simply in favor of or in opposition to reconsidering the 2017 Final Rule. As with the 2017 Final Rule, it was possible to achieve a rough approximation that broke down the universe of comments in this manner. More than 150,000 commenters wrote in favor of payday lending generally or in opposition to regulation generally. Approximately 31,000 commenters wrote in opposition to payday lending generally or in opposition to regulation generally.

Somewhat fewer comments either explicitly supported or opposed generally the proposed revocation of the 2017 Final Rule or could be fairly read to support or oppose the specific rule proposed in the 2019 NPRM. Of the individual comments that specifically addressed the 2019 NPRM, just over half (approximately 29,000 comments) more specifically supported the 2019 NPRM and/or opposed the Mandatory Underwriting Provisions of the 2017 Final Rule, while

[87] *https://www.regulations.gov/docket?D=CFPB-2019-0006*.

somewhat fewer (approximately 25,000 comments) more specifically opposed the 2019 NPRM and/or supported the Mandatory Underwriting Provisions of the 2017 Final Rule.

A rough estimate of pro and con submissions by individuals may provide insight as to public interest in a topic and to individual consumer experiences. However, under both the Administrative Procedure Act (APA)[88] and the Dodd-Frank Act, the Bureau must base its determinations in rulemaking on the facts and the law in the rulemaking record as a whole.

A comment submitted by a consumer group observed that many of the individual comments writing in favor of the 2019 NPRM used identical or near-identical language and stories, and even repeated certain typographical errors. The consumer group stated that such patterns suggested that the comments were not submitted by actual consumers sharing their real experiences. The comment did not provide support for the suggested inference.

Ex parte communications. In addition to comments submitted to the docket, the Bureau also considered input from 17 *ex parte* meetings and telephone conferences. These communications were memorialized in the form of summary memoranda and placed into the docket for this rulemaking.[89]

Comments on the Payment Provisions. In the 2019 NPRM, the Bureau did not propose to reconsider the Payment Provisions of the 2017 Final Rule. The Payment Provisions are outside the scope of this final rule. However, the Bureau has received a rulemaking petition to exempt debit card payments from the Rule's Payment Provisions.

The Bureau also received requests related to various aspects of the Payment Provisions or the Rule as a whole, including requests to exempt certain types of lenders or loan products from

---

[88] 5 U.S.C. 551 *et seq.*, 701 *et seq.*

[89] The docket is available at *https://www.regulations.gov/docket?D=CFPB-2019-0006*.

the Rule's coverage and to delay the compliance date for the Payment Provisions. The Bureau has engaged with several stakeholders on their requests related to various aspects of the Payment Provisions, including receiving questions related to implementation as well as requests to exempt certain types of lenders or loan products from the Rule's coverage. The Bureau, concurrent with the release of this final rule, has issued compliance aids, including FAQs and an updated Small Entity Compliance Guide, to respond to certain queries and to support ongoing implementation efforts. In addition, the Bureau has also issued a policy statement to address concerns pertaining to the coverage of certain large loans. The Bureau will monitor and assess the effects of the Payment Provisions and determine whether further action is needed in light of what it learns. In addition, the Bureau intends to use its market monitoring authority to gather data on whether the requirement in the 2017 Final Rule that lenders provide consumers with "unusual withdrawal" notices before the lenders make certain withdrawal attempts are made affects the number of unsuccessful withdrawals made from consumers' accounts.

IV. Legal Authority

The Bureau adopted the Mandatory Underwriting Provisions in principal reliance on the Bureau's authority under section 1031(b) of the Dodd-Frank Act.[90] Section 1031(b) of the Dodd-Frank Act provides that the Bureau "may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." Section 1031(b) of the Dodd-Frank Act further provides that rules under section 1031 may include requirements for the purpose of preventing such acts or practices.

[90] 12 U.S.C. 5531(b).

Section 1031(c)(1) of the Dodd-Frank Act provides that the Bureau shall have no authority under section 1031 to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers, and that such substantial injury is not outweighed by countervailing benefits to consumers or to competition.[91] The unfairness provisions of the Dodd-Frank Act are similar to the unfairness provisions under the Federal Trade Commission Act (FTC Act), and the meaning of the Bureau's authority under section 1031(b) is informed by the FTC Act unfairness standard and Federal Trade Commission (FTC or Commission) and other Federal agency rulemakings.[92] When applying section 1031(c) of the Dodd-Frank Act, the Bureau also considers the FTC's "Commission Statement of Policy on Scope of Consumer Unfairness Jurisdiction" (FTC Unfairness Policy Statement), the principles of which Congress generally incorporated into section 5 of the FTC Act.[93]

---

[91] 12 U.S.C. 5531(c)(1). Additionally, section 1031(c)(2) of the Dodd-Frank Act provides that in determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination. 12 U.S.C. 5531(c)(2).

[92] 82 FR 54472, 54520. *See also* 15 U.S.C. 41 *et seq.* Section 5(n) of the FTC Act, as amended in 1994, provides that the FTC shall have no authority to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the FTC may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination. 15 U.S.C. 45(n).

[93] *See* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), *reprinted in In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070-88 (1984); *see also* S. Rep. No. 103-130, at 12-13 (1993) (legislative history to FTC Act amendments indicating congressional intent to codify the principles of the FTC Unfairness Policy Statement).

Under section 1031(d) of the Dodd-Frank Act, the Bureau "shall have no authority . . . to declare an act or practice abusive in connection with the provision of a consumer financial product or service" unless the act or practice meets at least one of several enumerated conditions.[94] Section 1031(d)(2) of the Dodd-Frank Act provides, in pertinent part, that an act or practice is abusive when it takes unreasonable advantage of: (1) a consumer's lack of understanding of the material risks, costs, or conditions of the product or service; or (2) a consumer's inability to protect the interests of the consumer in selecting or using a consumer financial product or service.

In addition to section 1031 of the Dodd-Frank Act, the Bureau relied on other legal authorities for certain aspects of the Mandatory Underwriting Provisions.[95] These include: the principal step-down exemption for certain loans in § 1041.6; two provisions (§§ 1041.10 and 1041.11) that facilitate lenders' ability to obtain certain information about consumers' borrowing history from information systems that have registered with the Bureau; and certain recordkeeping requirements in § 1041.12.

In adopting each of these provisions, the Bureau relied on one or more of the following authorities. Section 1022(b)(3)(A) of the Dodd-Frank Act authorizes the Bureau, in a rulemaking, to conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products or services from any rule issued under title X, which includes a rule issued under section 1031, as the Bureau determines is necessary or appropriate to carry out the purposes and objectives of title X. In doing so, the Bureau must take into

[94] 12 U.S.C. 5531(d).

[95] *See* 82 FR 54472, 54522.

consideration the factors set forth in section 1022(b)(3)(B) of the Dodd-Frank Act.[96] Section 1022(b)(3)(B) specifies three factors that the Bureau shall, as appropriate, take into consideration in issuing such an exemption.[97] The Bureau also relied, in adopting certain provisions, on its authority under section 1022(b)(1) of the Dodd-Frank Act to 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.[98] The term "Federal consumer financial law" includes rules prescribed under title X of the Dodd-Frank Act, including those prescribed under section 1031.[99] Additionally, the Bureau relied, for certain provisions, on other authorities, including those in sections 1021(c)(3), 1022(c)(7), 1024(b)(7), and 1032 of the Dodd-Frank Act.[100]

The Bureau's decisions to use these authorities were premised on its decision to use its authority under section 1031 of the Dodd-Frank Act. In light of the Bureau's decision to revoke its use of section 1031 authority in the Mandatory Underwriting Provisions, the Bureau now concludes that it must also revoke its uses of these other authorities in the Mandatory Underwriting Provisions. The specific provisions of the 2017 Final Rule that the Bureau is revoking are discussed further in the section-by-section analysis in part VIII below.

---

[96] 12 U.S.C. 5512(b)(3)(A).

[97] 12 U.S.C. 5512(b)(3)(B).

[98] 12 U.S.C. 5512(b)(1). The Bureau also interprets section 1022(b)(1) of the Dodd-Frank Act as authorizing it to revoke or amend a previously issued rule if it determines such rule is not necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, including a rule issued to identify and prevent unfair, deceptive, or abusive acts or practices.

[99] 12 U.S.C. 5481(14).

[100] *See* 82 FR 54472, 54522; *see also* 12 U.S.C. 5511(c)(3), 5512(c)(7), 5514(b)(7), 5522.

V. Amendments to 12 CFR Part 1041 to Eliminate the Mandatory Underwriting Provisions—Revoking the Identification of an Unfair Practice

The Bureau has determined that the grounds provided in the 2017 Final Rule do not support its determination that the identified practice is unfair, thereby eliminating the basis for the Mandatory Underwriting Provisions to address that conduct.[101]

This part explains the Bureau's reasons for determining that the identified practice in the 2017 Final Rule is not unfair under section 1031 of the Dodd-Frank Act. Combined with the Bureau's determinations concerning abusive practices set out in part VI below, the Mandatory Underwriting Provisions are therefore not supported by an appropriate legal or evidentiary basis.[102]

Part V.A reviews certain of the factual predicates and legal conclusions underlying this use of authority. Part V.B sets forth the Bureau's legal and factual bases, under section 1031(c) of the Dodd-Frank Act, for withdrawing its previous finding that an injury associated with the identified practice is not reasonably avoidable. Part V.C analyzes the reasons why the Bureau

---

[101] The rulemaking addresses the legal and evidentiary bases for particular rule provisions identified in this final rule. It does not prevent the Bureau from exercising other tool choices, such as appropriate exercise of supervision and enforcement tools, consistent with the Dodd-Frank Act and other applicable laws and regulations. It also does not prevent the Bureau from exercising its judgment in light of factual, legal, and policy factors in particular circumstances as to whether an act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers, and whether such substantial injury is not outweighed by countervailing benefits to consumers or to competition.

[102] The Bureau notes that, alongside covered short-term loans, the 2017 Final Rule included covered longer-term balloon-payment loans within the scope of the identified unfair and abusive practice. The Bureau stated that it was concerned that the market for covered longer-term balloon-payment loans, which is currently quite small, could expand dramatically if lenders were to circumvent the Mandatory Underwriting Provisions by making these loans without assessing borrowers' ability to repay. 82 FR 54472, 54583-84. The Bureau did not separately analyze the elements of unfairness and abusiveness for covered longer-term balloon-payment loans. *See id.* at 54583 n.626. Because the Bureau's identification in the 2017 Final Rule that the failure to determine ability to repay was unfair for covered longer-term balloon-payment loans was predicated on its identification that it was unfair to fail to determine ability to repay for covered short-term loans, in the 2019 NPRM the Bureau proposed that if the identification for covered short-term loans is revoked then the identification for covered longer-term balloon-payment loans also should be revoked. The Bureau received no comments on this proposed treatment of covered longer-term balloon-payment loans and so finalizes it as proposed.

has revalued the countervailing benefits under the unfairness analysis and determined that they were greater than the Bureau found in the 2017 Final Rule, and that the benefits to consumers and competition in the aggregate from the practice outweigh any such injury.

A. Overview of the Factual Predicates and Legal Conclusions Underlying the Identification of an Unfair Practice in Section 1041.4

As noted above, section 1031(c)(1)(A) of the Dodd-Frank Act states that the Bureau has no authority to declare an act or practice to be unfair unless the Bureau has a reasonable basis to conclude that the act or practice causes or is likely to cause substantial injury which is not reasonably avoidable by consumers and that such substantial injury is not outweighed by countervailing benefits to consumers or to competition.[103]

In the 2017 Final Rule, the Bureau found that the practice of making covered short-term or longer-term balloon-payment loans to consumers without reasonably determining if the consumers have the ability to repay them according to their terms causes or is likely to cause substantial injury to consumers. The Bureau reasoned that where lenders were engaged in this identified practice and the consumer in fact lacks the ability to repay, the consumer will face choices—default, delinquency, and reborrowing, as well as the negative collateral consequences of being forced to forgo major financial obligations or basic living expenses to cover the unaffordable loan payment—each of which the Bureau found in the 2017 Final Rule leads to injury for many of these consumers and "the sum of that injury is very substantial."[104]

---

[103] 12 U.S.C. 5531(c)(1).

[104] 82 FR 54472, 54590-94.

The Bureau in the 2017 Final Rule found that consumers could not reasonably avoid this substantial injury. The Bureau stated that, under section 1031(c)(1)(A) of the Dodd-Frank Act, an injury is reasonably avoidable if consumers "have reasons generally to anticipate the likelihood and severity of the injury and the practical means to avoid it."[105] The Bureau added: "[t]he heart of the matter here is consumer perception of risk, and whether borrowers are in [a] position to gauge the likelihood and severity of the risks they incur by taking out covered short-term loans in the absence of any reasonable assessment of their ability to repay those loans according to their terms."[106]

In applying this standard, the 2017 Final Rule focused on borrowers' ability to predict their individual outcomes prior to taking out loans. The Bureau acknowledged that it "is possible that many borrowers accurately anticipate their debt duration."[107] However, the Bureau stated that its "primary concern is for those longer-term borrowers who find themselves in extended loan sequences" and that for those borrowers "the picture is quite different, and their ability to estimate accurately what will happen to them when they take out a payday loan is quite limited."[108] That led the Bureau to conclude that "many consumers do not understand or perceive the probability that certain harms will occur"[109] and that therefore it would not be reasonable to expect consumers to take steps to avoid injury.[110] Note that, although the Bureau made these statements about consumers who take out payday loans as part of an extended sequence, the identified practice and the corresponding Mandatory Underwriting Provisions to

---

[105] *Id.* at 54594.

[106] *Id.* at 54597.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* at 54594.

address that practice apply to all consumers who take out all payday loans, including those that are not part of an extended sequence.

The 2017 Final Rule based that finding primarily on the Bureau's interpretation of limited data from a study by Professor Mann of Columbia Law School. The Mann study compared consumers' predictions when taking out a payday loan about how long they would be in debt with administrative data from lenders showing the actual duration consumers were in debt.[111] The Bureau did not base its central findings on the conclusions in Professor Mann's study. Rather, the Bureau selected limited data compiled in the course of that study, conducted its own analysis of the data, and interpreted the results as "provid[ing] the most relevant data describing borrowers' expected durations of indebtedness with payday loan products."[112] The Bureau's interpretation of limited data from the Mann study is discussed in part V.B.1 below.[113]

In further support of the finding in the 2017 Final Rule that some consumers were not in a position to evaluate the likelihood and severity of these risks and therefore it would not be reasonable to expect consumers to take steps to avoid the injury, the Bureau in the 2017 Final Rule relied on other findings, including those related to the marketing and servicing practices of providers of short-term loans,[114] and on the Bureau's own expertise and experience in

---

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

[112] 82 FR 54472, 54816.

[113] The Bureau also referenced two academic studies, one of which compared borrowers' belief about the average borrower with data about the average outcome of borrowers and the other of which compared borrowers' predictions of their own borrowing with average outcomes of borrowers in another State. These studies found that borrowers appear, on average, somewhat optimistic about the length of their indebtedness. *See id.* at 54568, 54836. However, the Bureau noted the weaknesses of these studies, *id.* at 54568, and, as discussed, relied primarily on the Bureau's interpretation of limited data from the Mann study.

[114] *See, e.g.*, *id.* at 54616.

supervisory matters and enforcement actions concerning covered lenders in the markets for covered short-term and longer-term balloon-payment loans.[115] These additional factors are discussed in detail in part V.C.2 below.

B. Reasonable Avoidability

1. Reasonable Avoidability—Legal Standard

The Bureau's Proposal

The Bureau determined in the 2017 Final Rule that making covered short-term or longer-term balloon-payment loans without reasonably assessing a borrower's ability to repay the loan according to its terms is an unfair act or practice. In making this determination, the Bureau concluded that this practice: (1) caused or was likely to cause substantial injury to consumers; (2) which is not reasonably avoidable by consumers; and (3) that such injury was not outweighed by countervailing benefits to consumers or competition.[116]

In the 2017 Final Rule, the Bureau interpreted section 1031(c)(1)(A) of the Dodd-Frank Act to mean that for an injury to be reasonably avoidable consumers must "have reason generally to anticipate the likelihood and severity of the injury and the practical means to avoid it."[117] The Bureau interpreted this standard as requiring consumers to have a specific understanding of the magnitude and severity of their personal risks such that they could accurately predict how long they would be in debt after taking out a covered short-term or longer-term balloon-payment loan.[118] The Bureau stated in the 2017 Final Rule that such borrowers "typically understand that

[115] *Id.* at 54505-07.

[116] *Id.* at 54588.

[117] *Id.* at 54594.

[118] *Id.* at 54594-96.

they are incurring a debt which must be repaid within a prescribed period of time and that, if they are unable to do so, they will either have to make other arrangements or suffer adverse consequences."[119] The Bureau also stated that its interpretation of limited data from the Mann study indicated that most payday borrowers expected some repeated sequences of loans.[120] Nonetheless, the Bureau stated that "[t]he heart of the matter here is consumer perception of risk, and whether borrowers are in [a] position to gauge the likelihood and severity of the risks they incur by taking out covered short-term loans in the absence of any reasonable assessment of their ability to repay those loans according to their terms."[121] Because it found that consumers do not understand or perceive the probability that certain harms will occur, including the substantial injury that can flow from default, reborrowing, and the negative collateral consequences of making unaffordable payments, the Bureau found that consumers could not reasonably avoid the harm.[122]

The Bureau in the 2019 NPRM expressed concern about the standard that it applied in the 2017 Final Rule for reasonable avoidability under section 1031(c)(1)(A) of the Dodd-Frank Act. The 2019 NPRM stated that, in assessing whether consumers could reasonably avoid harm, the Bureau in the 2017 Final Rule concluded that they could not without a *specific* understanding of their *individualized* risk, as determined by their ability to accurately predict how long they would be in debt after taking out a covered short-term or longer-term balloon-payment loan.[123] In reconsidering this interpretation of reasonable avoidability, the Bureau preliminarily determined

[119] *Id.* at 54615.

[120] *Id.* at 54569.

[121] *Id.* at 54597.

[122] *Id.* at 54594; *see also id.* at 54597.

[123] *Id.* at 54597-98.

that consumers need not have a specific understanding of their individualized likelihood and magnitude of harm such that they could accurately predict how long they would be in debt after taking out a covered short-term or longer-term balloon-payment loan for the injury to be reasonably avoidable. The Bureau reasoned that requiring consumers to know their individualized likelihood and magnitude of risk of harm for that harm to be reasonably avoidable would overstate consumer injury and effectively shift the burden to lenders to make such determinations. This burden shifting would deter lenders from offering products or product features, which would suppress rather than facilitate consumer choice.

The 2019 NPRM stated that the particular problem with the 2017 Final Rule is illustrated by how the Bureau responded to several comments that urged the Bureau to mandate consumer disclosures instead of imposing an ability-to-repay requirement. In rejecting that suggestion, the Bureau stated that "generalized or abstract information" about the attendant risks would "not inform the consumer of the risks of the particular loan in light of the consumer's *particular* financial situation."[124] Upon further consideration, in the 2019 NPRM the Bureau preliminarily determined that there was a better reasonable avoidability standard than the one set out in the 2017 Final Rule. The 2019 NPRM explained that FTC Act precedent informs the Bureau's understanding of the unfairness standard under section 1031(c)(1)(A) of the Dodd-Frank Act. In analyzing unfairness under the FTC Act, the FTC and courts have held that "an injury is reasonably avoidable if consumers have reason to anticipate the impending harm and the means to avoid it,"[125] meaning that "people know the physical steps to take in order to prevent"

[124] *Id.* at 54637 (emphasis added).

[125] *See Davis v. HSBC Bank Nev.*, 691 F.3d 1152, 1168 (9th Cir. 2012).

injury,[126] but also “understand the necessity of actually taking those steps.”[127] The 2019 NPRM noted that the Bureau in the 2017 Final Rule had not identified relevant precedent suggesting that consumers must understand their own specific individualized likelihood and magnitude of harm to reasonably avoid injury.

The Bureau also stated in the 2019 NPRM that its approach to reasonable avoidability was consistent with trade regulation rules promulgated by the FTC over several decades to address unfair or deceptive practices that occur on industry-wide bases.[128] To prevent such conduct, the Bureau stated that the FTC has routinely established disclosure requirements that mandate that businesses provide to consumers general information about material terms, conditions, or risks related to products or services.[129] However, according to the 2019 NPRM, no FTC trade regulation rule based on unfairness has required businesses to provide individualized forecasts or disclosures of each customer’s or prospective customer’s own specific likelihood and magnitude of potential harm.[130]

The Bureau stated in the 2019 NPRM its preliminary conclusion that injury is reasonably avoidable if payday borrowers have an understanding of the likelihood and magnitude of risks of harm associated with payday loans sufficient for them to anticipate those harms and understand

---

[126] *See Int’l Harvester*, 104 F.T.C. at 1066.

[127] *Id.*

[128] Section 18 of the FTC Act provides that the FTC is authorized to prescribe “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce” within the meaning of section 5 of the FTC Act. 15 U.S.C. 57a. The FTC’s trade regulation rules are codified at 16 CFR part 400.

[129] *See, e.g.*, *Use of Prenotification Negative Option Plans Rule*, 16 CFR 425.1(a)(1) (promotional material must clearly and conspicuously disclose material terms); *Funeral Industry Practices Rule*, 16 CFR 453.2(b) (requiring itemized price disclosures of funeral goods and services and other non-consumer specific disclosures); *Credit Practices Rule*, 16 CFR 444.3 (prohibiting certain practices and requiring disclosures about cosigner liability).

[130] For example, the Credit Practices Rule requires that a covered creditor to provide a “Notice to Cosigner” disclosure prior to a cosigner becoming obligated on a loan. This notice advises in a concise and general manner consumers who cosign obligations about their potential liability. This notice is not individually tailored and does not require a covered creditor to disclose information about the severity or likelihood of risks related to cosigner liability. *See* 16 CFR 444.3.

the necessity of taking reasonable steps to prevent resulting injury. Specifically, this means consumers need only understand that a significant portion of payday borrowers experience difficulty repaying and that if such borrowers do not make other arrangements they may either end up in extended loan sequences, default, or struggle to pay other bills after repaying their payday loan. The Bureau preliminarily determined in the 2019 NPRM that this approach, consistent with the FTC's longstanding approach on informed consumer decision-making in its interpretation of the unfairness standard, is the better interpretation of section 1031(c)(1)(A) as a legal and policy matter. In the Bureau's preliminary judgment, this approach appropriately emphasized prohibiting practices that prevent or hinder informed consumer decision-making in the marketplace.[131]

Applying an interpretation in the 2019 NPRM that was more consistent with FTC precedent, the Bureau preliminarily concluded that, assuming for purposes of argument that the identified practice causes or is likely to cause substantial injury, consumers could reasonably avoid that injury. As noted above, in the 2017 Final Rule, the Bureau found that payday loan borrowers "typically understand they are incurring a debt which must be repaid within a prescribed period of time and that, if they are unable to do so, they will either have to make other arrangements or suffer adverse consequences."[132] The 2019 NPRM stated that consumers who

[131] As the FTC stated in the FTC Unfairness Policy Statement: "[W]e expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory." FTC Unfairness Policy Statement, *Int'l Harvester*, 104 F.T.C. at 1074. *See also Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988) ("The Commission's focus on a consumer's ability to reasonably avoid injury 'stems from the Commission's general reliance on free and informed consumer choice as the best regulator of the market.'") (quoting *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 976 (D.C. Cir. 1985) (*AFSA*)).

[132] 82 FR 54472, 54615.

have reborrowed in the past would seem particularly likely to have an understanding that such reborrowing is relatively common even if they cannot predict specifically how long they will need to borrow. Further, the 2019 NPRM noted a Bureau analysis of a study of State-mandated payday loan disclosures—which inform consumers about repayment and reborrowing rates— in which the majority of consumers in the study continued to take out payday loans despite the disclosures.[133] The 2019 NPRM stated that a plausible explanation for the limited effect of disclosures on consumer behavior in this study is that payday loan users were already aware that such loans can result in extended loan sequences.

The 2019 NPRM stated that the Bureau in the 2017 Final Rule did not offer evidence that would support the conclusion that consumers cannot reasonably avoid substantial injury from taking out payday loans applying a standard that focuses on understanding that is sufficient to alert consumers of the need to take steps to protect themselves from the harm from taking out such loans. The Bureau also found in the 2017 Final Rule that consumers who would not be offered a payday loan under either § 1041.5 or § 1041.6 would have alternatives to payday loans.[134] Accordingly, the Bureau preliminarily determined that there is not a sufficient evidentiary basis on which to find that consumers cannot reasonably avoid substantial injury caused or likely to be caused by lenders making covered short-term and longer-term balloon-payment loans without assessing borrowers' ability to repay.[135]

[133] *Id.* at 54577-78; *see* Tex. Office of Consumer Credit Comm'r, *Credit Access Businesses*, http://occc.texas.gov/industry/cab.

[134] 82 FR 54472, 54840-41.

[135] Relatedly, the 2019 NPRM proposed to find that "robust and reliable" evidence was necessary in order to support a determination that consumers cannot reasonably avoid injury, in light of the dramatic impacts of the Rule on the market; this approach to requiring "robust and reliable" evidence is discussed in part V.B.2 of this preamble.

The Bureau sought comments on reasonable avoidability, including the Bureau's revised interpretation of reasonable avoidability under section 1031(c)(1) of the Dodd-Frank Act. The Bureau requested comment about the types or sources of information with respect to consumer understanding about covered short-term and longer-term balloon-payment loans that would be pertinent to a determination of whether consumers can reasonably avoid the substantial injury caused or likely to be caused by the identified practice.

Comments Received—Reasonable Avoidability Standard

Industry commenters and a group of 12 State attorneys general stated that the 2019 NPRM's proposed application of reasonable avoidability in unfairness was consistent with established principles of consumer protection law. A group of 12 State attorneys general stated that the Dodd-Frank Act requires the Bureau to look to the FTC Act when interpreting its UDAAP authorities. A commenter asserted that understanding has been long understood to mean a general awareness of possible outcomes, not an understanding of one's individual likelihood of being exposed to risks. Commenters stated that requiring covered lenders to assess whether consumers can avoid harm by repaying a loan would shift the risk calculus from consumers to lenders and deprive consumers of choice.

Several commenters opined on the legal standards the Bureau should use when assessing reasonable avoidability more broadly. Citing *Katharine Gibbs School (Inc.) v. FTC*, a commenter stated that FTC precedent does not support the use of unfairness authority to prescribe core economic terms, such as imposing an ability-to-repay requirement.[136] Industry commenters and 12 State attorneys general commented that the proper focus of reasonable avoidability is on free and informed consumer choice. According to the commenters, unless a

[136] 612 F.2d 658 (2d Cir. 1979).

lender's conduct interferes with free choice, such as through deception or coercion, harm from a financial product is reasonably avoidable. In other words, according to the commenters, if any of the reasons that consumers could not avoid harm caused by a lender was not itself also caused by the lender, the act or practice is not unfair.

Consumer groups and a group of 25 State attorneys general stated that the 2019 NPRM's proposed standard was unreasonably restrictive and misapplied lessons from FTC precedent. Some commenters stated that FTC precedent indicates that consumers must understand their individualized likelihood and magnitude of harm—a general understanding of risk is insufficient. Citing *International Harvester*, a group of 25 State attorneys general stated that for consumers to understand the necessity of taking steps to avoid harm, they must understand the "full consequences" that might follow from their decision to use covered loans.[137]

Other commenters stated that the 2019 NPRM mischaracterized the 2017 Final Rule's standard for reasonable avoidability.[138] According to these commenters, the 2017 Final Rule did not state that consumers had to have a specific understanding of their individualized risks for a harm to be reasonably avoidable. Rather, a general awareness of the specific risks of injury was sufficient. Thus, according to these commenters, the 2019 NPRM's standard for reasonable avoidability is essentially identical to the 2017 Final Rule's standard.

At least one commenter stated that the 2019 NPRM's application of reasonable avoidability is inconsistent with the Bureau's proposed standard. The 2019 NPRM stated that for harm to be reasonably avoidable, "consumers need only to understand that a significant

[137] *Int'l Harvester*, 104 F.T.C. at 1066.

[138] The 2019 NPRM stated that "[i]n assessing whether consumers could reasonably avoid harm, the Bureau in the 2017 Final Rule concluded that they could not without a specific understanding of their individualized risk, as determined by their ability to accurately predict how long they would be in debt after taking out a covered short-term or longer-term balloon-payment loan." 84 FR 4252, 4269.

portion of payday borrowers experience difficulty repaying and that if such borrowers do not make other arrangements they either end up in long loan sequences, default, or struggle to pay other bills after repaying their payday loan." A commenter argued that this statement appears to omit the "likelihood and magnitude of risks of harm" language in the standard and ignores whether consumers have the means to avoid the harm.

Some commenters stated that in crafting the 2019 NPRM's proposed standard, the Bureau misread portions of *International Harvester*. One commenter stated that the specific disclosure that the 2019 NPRM cited as making harm reasonably avoidable was criticized by the Commission for failing to spell out the exact nature of the hazard at a level of detail that would effectively motivate compliance.[139]

Comments Received—Consumer Understanding of the Risk of Harm

In applying the proposed standard and assessing whether injury is reasonably avoidable, industry commenters and a group of 12 State attorneys general stated that consumers have sufficient information to understand the likelihood and magnitude of covered loan risk. Commenters asserted that consumers rationally choose to use covered loan products and a lack of understanding does not drive covered loan use.

In support of the proposition that consumers have requisite understanding about covered loan risk of harm, a non-profit research and advocacy organization commenter stated that the 2017 Final Rule recognized that consumers generally understand how covered loans function and

[139] *Int'l Harvester*, 104 F.T.C. at 1054.

that non-payment has consequences.[140] Twelve State attorneys general agreed with the 2019 NPRM's interpretation of a Bureau analysis of a study of State-mandated payday loan disclosures to conclude that the disclosures' limited impact on reborrowing suggests that consumers are already aware that such loans can result in extended loan sequences.[141] Another commenter identified two studies—the Mann study and the Miller study[142]—that the commenter stated demonstrate that consumers make informed choices when using covered loans. Commenters also pointed to the purportedly low frequency of consumer complaints about covered loans to the Bureau, FTC, and State regulatory agencies as evidence that consumers understand covered loan products and appreciate their access and use.

In contrast, consumer group commenters and 25 State attorneys general disagreed with the 2019 NPRM's preliminary determination that the 2017 Final Rule wrongly found that consumers do not understand the likelihood and magnitude of risk of harm. A commenter stated that the 2017 Final Rule specifically found that consumers do not understand the risks and costs of unaffordable loans made without assessing ability to repay, including how long they would be in debt or the consequences of extended reborrowing.[143] Commenters stated that the 2019 NPRM did not provide a reasoned explanation to disregard that finding. Further, these commenters stated that the 2019 NPRM offered no evidence that payday loan users understand

[140] 82 FR 54472, 54615 ("[B]orrowers who take out a payday, title, or other covered short term loan typically understand that they are incurring a debt which must be repaid within a prescribed period of time and that if they are unable to do so, they will either have to make other arrangements or suffer adverse consequences.").

[141] 84 FR 4252, 4271.

[142] *See* Ronald J. Mann, *Assessing the Optimism of Payday Loan Borrowers*, 21 Supreme Court Econ. Rev. 105 (2013) (60 percent of borrowers can accurately predict how long they would take to repay their loan); Thomas W. Miller, Jr., *Differences in Consumer Credit Choices Made by Banked and Unbanked Mississippians*, 11 J.L. Econ. & Pol'y 367 (2015) (60 percent of unbanked borrowers understand the loans terms that they had taken out).

[143] In 2017, the Bureau found "evidence showing that a significant proportion of consumers do not understand the kinds of harms that flow from unaffordable loans, including those imposed by default, delinquency, re-borrowing, and the collateral consequences of making unaffordable payments to attempt to avoid these other injuries." 82 FR 54472, 54617.

the various harms that flow from extended reborrowing, that a significant portion of payday borrowers experience difficulty repaying and that if such borrowers do not make other arrangements they either end up in long loan sequences, or that such users even have a general awareness about the risks of covered loans.

These commenters also objected to the Bureau's preliminary determination in the 2019 NPRM that the record supports the finding that consumers affirmatively understand the likelihood and magnitude of risk of harm related to covered loans. Several commenters stated that the Bureau's interpretation of a study of State-mandated payday loan disclosures was not plausible and was speculative. An academic commenter stated that this interpretation is contradicted by a study that the Bureau had not previously considered that found a significant proportion of payday loan users understand neither loan terms nor costs.[144] This commenter asserted that a more plausible interpretation of the study is that the State-mandated disclosures are simply ineffective. A commenter also objected to the 2019 NPRM's suggestion that consumers can infer certain risks associated with covered loans, either because of their limited options or the fact payday loans are advertised as products designed to assist those in financial distress. This commenter stated that this suggestion ignores informational asymmetry between consumers and lenders regarding the performance of credit products. Further, this commenter stated that any mere inference that short-term loans are risky does not reveal information about the likelihood and magnitude of that risk. A commenter also questioned the 2019 NPRM's proposed presumption that borrowers' prior experience with covered loans imparts sufficient

[144] Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 Ariz. L. Rev. 563 (2010) (Martin study), *https://www.regulations.gov/contentStreamer?documentId=CFPB-2019-0006-27713&attachmentNumber=3&contentType=pdf* (interviews with approximately 130 payday loan users in Albuquerque found that 60 percent of consumers who had just taken out loans could not accurately estimate their APR and 52 percent could not accurately describe the dollar costs of their loans).

understanding about risk, noting that the Mann study found that heavy users “are least likely” to predict how long they will be in loan sequences.

In arguing that harm is not reasonably avoidable, commenters noted that the 2019 NPRM did not address seller behavior that can hinder understanding and consumer choice. Such conduct cited by these commenters includes deceptive advertising and marketing, providing misleading or incomplete information, failing to comply with State small-dollar lending laws, such as disclosures rules and rollover limits, preventing borrowers from self-amortizing, and coercing or steering borrowers into unaffordable reborrowing.

Several commenters stated that lack of understanding need not always be present to establish that harm is not reasonably avoidable and that the pervasiveness and widespread substantial injury is itself significant evidence of unavoidable harm. At least one commenter suggested that the fact that consumers experience payday lending problems and continue using them is evidence that the harm is not reasonably avoidable.

Several commenters also discussed how behavioral factors—such as financial distress and optimism bias—impair understanding and skew consumer perception of risk. A commenter noted that storefront loan borrowers frequently have unrealistic expectations about their ability to repay loans because they focus on short-term, emergency needs over potentially devastating future long-term losses. Another commenter stated that consumers cannot reasonably understand the dramatically higher levels of risk involved with covered loans compared to conventional credit, given the open-ended costs associated with long loan sequences.

Comments Received—Means to Avoid Harm

With respect to whether consumers have the means to avoid harm, consumer group commenters and 25 State attorneys general stated that consumers have alternatives to payday loans. Alternatives identified by these and other commenters include credit cards, non-recourse pawn loans, payday loan alternatives (*e.g.*, wage access products), fintech offerings, borrowing from friends, family, and community organizations, and cutting back on expenses.[145] Commenters cited the millions of consumers living in States where payday lending is banned or restricted as evidence that consumers have alternatives to covered loans. In the absence of payday loans, consumer group commenters and 25 State attorneys general stated that consumers do not turn to illegal loans—a point with which some industry commenters disagreed. At least one commenter stated that access to more reliable and transparent credit options—like low-cost personal loans, payday loan alternatives, and safer products from mainstream financial institutions—exist for most consumers and are consistently expanding. Another commenter stated that banks and credit unions are well-positioned to responsibly issue small-dollar loans if they are provided with proper guidelines.

Notwithstanding a general consensus reflected in the comments that payday loan alternatives exist, some commenters stated that consumers lack the means to avoid harm. Some consumer groups stated that the 2017 Final Rule had found limited alternatives and borrowers' perceptions of their alternatives. At least one commenter stated that borrowers using covered loans have limited options and limited time in which to assess them and that most do not have access to other formal sources of credit and informal sources of credit have high search costs. Other commenters stated that even when alternatives do exist, consumers do not pursue lower-cost credit because of the ubiquity and convenience of payday lenders.

---

[145] *See, e.g.*, Nat'l Consumer Law Ctr., *After Payday Loans: How do Consumers Fare When States Restrict High-Cost Loans?* (Oct. 2018), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/ib_how-consumers-fare-restrict-high-cost-loans-oct2018.pdf; Southern Bancorp Community Partners, *Into the Light: A Survey of Arkansas Borrowers Seven Years after State Supreme Court Bans Usurious Payday Lending Rates* (Apr. 2016), https://southernpartners.org/pp/PP_V43_2016.pdf.

A consumer group and an academic commenter commented that the fact that a consumer can avoid harm by not using covered loans is not sufficient. Citing *AFSA v. FTC*, commenters stated that consumers can generally decline a product or service, and "if the mere existence of that right" were the end of the inquiry, then no practice would be subject to unfairness regulation.[146] As articulated by another commenter, the "just say no" option does not constitute reasonable avoidability.

Numerous commenters, including consumer groups, community financial service institutions, and faith groups, stated that consumers cannot avoid injury once they have taken out a covered loan and are unable to repay. According to a consumer group and an academic commenter, once a borrower takes out an initial unaffordable loan, the only options are to choose between the harms associated with default, reborrowing, or forgoing other major financial obligations or basic living expenses.

Final Rule

After reviewing the comments, the Bureau is finalizing its interpretation of the standard for reasonable avoidability under section 1031(c)(1)(A) of the Dodd-Frank Act as proposed, with some clarification. Under this standard, the facts and the law in the record do not support the 2017 Final Rule's conclusion that the assumed substantial injury from making covered short-term or longer-term balloon-payment loans without reasonably assessing a borrower's ability to repay the loan according to its terms was not reasonably avoidable.

[146] *See AFSA*, 767 F.2d at 976-77 (holding that prohibited contract provisions were unavoidable in part because of industry-wide boilerplate that prevented consumers "from making meaningful efforts to search, compare, and bargain").

Final Rule—Reasonable Avoidability Standard

Pursuant to section 1031(c)(1)(A) of the Dodd-Frank Act, the Bureau determines that injury from making covered short-term or longer-term balloon-payment loans without reasonably assessing a borrower's ability to repay the loan according to its terms is reasonably avoidable if payday borrowers have an understanding of the likelihood and magnitude of risks of harm associated with payday loans sufficient for them to anticipate those harms and understand the necessity of taking reasonable steps to prevent resulting injury. Specifically, this means consumers need only understand that a significant portion of payday borrowers experience difficulty repaying and that if such borrowers do not make other reasonable arrangements they may either end up in extended loan sequences, default, or struggle to pay other bills after repaying their payday loan.

The interpretation of reasonable avoidability the Bureau is finalizing closely tracks FTC precedent.[147] The Bureau determines that FTC precedent is not inconsistent with the use of unfairness authority to prescribe what some commenters termed "core economic terms." For instance, in *Katharine Gibbs*, the court did not strike down the FTC's tuition refund requirements based on the innate character of the remedy. Instead, the court faulted the FTC for attempting to create "structural incentives for discriminate enrollment" to address problematic sales and enrollment practices without finding that refund practices at issue were deceptive or unfair.[148]

[147] *See Int'l Harvester*, 104 F.T.C. at 1066 (for an injury to be reasonably avoidable consumers must not only "know the physical steps to take in order to prevent it" but also "understand the necessity of actually taking those steps."); *Davis*, 691 F.3d at 1168 ("[A]n injury is reasonably avoidable if consumers have reason to anticipate the impending harm and the means to avoid it.") (quoting *Orkin*, 849 F.2d at 1365-66).

[148] *Katharine Gibbs School*, 612 F.2d at 662-63 ("Instead of defining with specificity the advertising, sales, and enrollment practices it deemed unfair and deceptive and setting forth requirements for preventing them, the Commission decided to make it financially unattractive for schools covered by the Rule to accept a student who, for any reason whatever, was unlikely to finish the course in which he or she had enrolled.").

As the court noted, "the Commission contented itself with treating violations of its 'requirements prescribed for the purpose of preventing' unfair practices as themselves the unfair practices."[149] Thus, the tuition refund requirement's flaw was not that it prescribed core economic terms. Further, the Bureau is aware of other examples of unfairness authority being used to establish substantive requirements in consumer financial transactions.[150] These examples include a Federal banking agency imposing requirements requiring that financial institutions make ability-to-repay determinations before making subprime mortgage loans.[151]

The Bureau also determines that, contrary to the suggestion of some comments, following the approach in *International Harvester* does not require that consumers understand their individualized risk in order for injury to be reasonably avoidable. As noted in that case, reasonable avoidability depends on whether risks are "adequately disclosed."[152] The Commission did not base its reasonable avoidability determination on whether consumers knew the probability that they would personally experience fuel geysering.[153] Instead, the Commission found the harm not reasonably avoidable because consumers "did not realize that a fuel geyser

---

[149] *Id.* at 662.

[150] *See Credit Card Rule*, 74 FR 5498 (Jan. 29, 2009) (Board, OTS, and NCUA concluded that it is an unfair act or practice to treat a payment on a consumer credit card account as late unless the consumer has been provided a reasonable amount of time to make that payment); *Credit Practices Rule*, 49 FR 7740 (Mar. 1, 1984) (prohibiting certain remedies that creditors frequently included in credit contracts for use when consumers defaulted on the loans were unfair, including confessions of judgments, irrevocable wage assignments, security interests in household goods, waivers of exemption, pyramiding of late charges, and cosigner liability).

[151] *Higher-Priced Mortgage Loan Rule*, 73 FR 44522 (July 30, 2008) (Board considered the FTC Act's unfairness standard when finding that extending credit without regard to borrowers' ability to repay was an unfair practice). *See also Credit Practices Rule*, 49 FR 7740 (Mar. 1, 1984) (prohibiting certain remedies that creditors frequently included in credit contracts for use when consumers defaulted on the loans were unfair, including confessions of judgments, irrevocable wage assignments, security interests in household goods, waivers of exemption, pyramiding of late charges, and cosigner liability).

[152] *Int'l Harvester*, 104 F.T.C. at 1066.

[153] *Id.*

was possible" and might engage in a dangerous practice (*i.e.*, loosening the fuel cap on farm equipment) "without consciousness of any particular risk."[154] Thus, the Bureau's current application of reasonable avoidability is consistent with *International Harvester* as it requires consumers to be aware of the particular risks associated with payday lending (such as extended loan sequences, default, etc.) sufficient to take steps to avoid or mitigate harm from those risks.

Moreover, aside from their criticisms of the Bureau's reading in the 2019 NPRM of certain FTC precedents (which the Bureau does not accept), commenters have not provided a compelling reason why the Bureau should interpret the reasonable avoidability element of section 1031(c)(1)(A) of the Dodd-Frank Act to require payday borrowers to have a specific understanding of their personal risks—such that they can accurately predict how long they will be in debt after taking out a covered short-term or longer-term balloon-payment loan. As the 2019 NPRM explained, the 2017 Final Rule's approach would mean that consumers cannot reasonably avoid injury even if they understand that a significant portion of payday borrowers experience difficulty repaying and that if such borrowers do not take reasonable steps they may either end up in extended loan sequences, default, or struggle to pay other bills after repaying their payday loan. The "focus on a consumer's ability to reasonably avoid injury 'stems from the Commission's general reliance on free and informed consumer choice as the best regulator of the market.'"[155] The Bureau is not persuaded that, if consumers have that level of understanding, they should be viewed as unable to take reasonable steps to avoid that harm. Accordingly, the

[154] *Id.* ("Farmers may have known that loosening the fuel cap was generally a poor practice, but they did not know from the limited disclosures made, nor could they be expected to know from prior experience, the full consequences that might follow from it.").

[155] 84 FR 4252, 4271 n.242 (quoting *Orkin Exterminating Co.*, 849 F.2d at 1365 (quoting *AFSA*, 767 F.2d at 976)).

Bureau does not believe that it should rely upon a legal standard that would treat such consumers as not knowing that they should consider taking steps to reasonably avoid injury.

The Bureau also concludes, contrary to the suggestion of some commenters, that the 2019 NPRM did not mischaracterize the 2017 Final Rule's approach to reasonable avoidability. The Bureau acknowledges that the 2017 Final Rule at times used language that was similar to the 2019 NPRM when summarizing the reasonable avoidability standard at a high level of generality.[156] However, as explained in the 2019 NPRM, the 2017 Final Rule actually applied a different legal standard as it relates to payday borrowers. The 2017 Final Rule principally relied on the Bureau's interpretation of limited data from the Mann study regarding borrowers' abilities to predict personal likelihood of reborrowing in assessing whether consumers adequately understood the likelihood and severity of harms. The 2017 Final Rule determined that borrowers lacked requisite understanding because some borrowers were unable to predict their individual likelihood of reborrowing.[157] In other words, the 2017 Final Rule used the Bureau's interpretation of limited data from the Mann study about individual likelihood of reborrowing as a proxy for understanding that is sufficient to alert consumers of the need to take steps to protect themselves from potential payday loan harm. Thus, notwithstanding the 2017 Final Rule's use of some language similar to that used in the 2019 NPRM when generally summarizing the reasonable avoidability standard, in substance the 2017 Final Rule interpreted the standard to require all consumers to have a specific understanding of individualized risk.

[156] *Compare* 82 FR 54472, 54596 ("[U]nless consumers have reason generally to anticipate the likelihood and severity of the injury, and the practical means to avoid it, the injury is not reasonably avoidable."), *with* 84 FR 4252, 4270 ("[I]njury is reasonably avoidable if payday borrowers have an understanding of the likelihood and magnitude of risks of harm associated with payday loans sufficient for them to anticipate those harms and understand the necessity of taking reasonable steps to prevent resulting injury.").

[157] *See* 82 FR 54472, 54597-98.

Moreover, contrary to the suggestions of some commenters, the 2019 NPRM did not omit the standard's requirement that consumers must appreciate the "likelihood and magnitude" of risk. The 2019 NPRM stated that the Bureau preliminarily concluded that injury is reasonably avoidable if payday borrowers have an understanding of the likelihood and magnitude of risks of harm associated with payday loans sufficient for them to anticipate those harms and understand the necessity of taking reasonable steps to prevent resulting injury.[158] The 2019 NPRM elaborated that this requires that consumers understand that a *significant portion* of payday borrowers experience difficulty repaying and that if such borrowers do not make other arrangements they either end up in *extended loan sequences, default, or struggle to pay other bills after repaying their payday loan.*[159] The Bureau notes that if consumers understand that a significant portion of payday borrowers experience adverse outcomes, they grasp the likelihood of risk. If consumers understand the potential outcomes arising from difficulty repaying, they appreciate the magnitude of those risks.

However, the Bureau agrees with comments that consumers must not only have a sufficient awareness of the risk of significant injury, but they also must have reasonable steps they can take to avoid that injury. The 2019 NPRM recognized that the means to avoid injury is a necessary component of the reasonable avoidability standard.[160] The Bureau discusses its application to covered loans below.

[158] 84 FR 4252, 4270.

[159] *Id.* (emphasis added).

[160] *See id.* at 4269 (citing *Davis*, 691 F.3d at 1168).

The Bureau does not regard as significant the considerations of the efficacy of disclosures discussed in *International Harvester*.[161] What is significant is that *International Harvester* stands for the proposition that harm is reasonably avoidable if consumers have requisite understanding of risks related to a product. The Bureau's revised application of the reasonable avoidability standard is more consistent with *International Harvester* as it incorporates criteria that would indicate whether consumers have a requisite understanding.

Accordingly, the Bureau concludes that the 2017 Final Rule applied a problematic standard for reasonable avoidability under section 1031(c)(1)(A) of the Dodd-Frank Act and adopts the better interpretation of reasonable avoidability set forth in the 2019 NPRM.

Final Rule—Consumer Understanding of Risk of Harm

Applying the revised standard for reasonable avoidability pursuant to section 1031(c)(1)(A) of the Dodd-Frank Act, the Bureau concludes that there is not a sufficient evidentiary basis for the Bureau to conclude that consumers cannot reasonably avoid substantial injury from lenders making covered short-term and longer-term balloon-payment loans without assessing borrowers' ability to repay the loan according to its terms.

As discussed in part V.B.2 below of this preamble, the 2019 NPRM proposed and the Bureau finalizes a determination that evidence is only sufficient for purposes of finding that injury is not reasonably avoidable if that evidence is robust and reliable, in light of the dramatic impacts of the Rule on the payday market. Thus, the relevant question here is whether there is

[161] *See* 104 F.T.C. at 1054. *International Harvester* is not entirely clear on whether the disclosure in question was efficacious. *See id.* at 1006 n.165 (the alternative disclosure "would have been the most effective [] warning up to that time, had it been adequately disseminated . . . . It did communicate the fact that a hazard existed and the principal steps an operator should take to avoid it.").

robust and reliable evidence for that finding, under the Bureau's revised standard for reasonable avoidability.[162]

The Bureau concludes that the 2019 NPRM provided a reasoned explanation for reconsidering the 2017 Final Rule's finding on reasonable avoidability. Specifically, the 2017 Final Rule's determination that a significant population of consumers do not understand the risks of substantial injury from covered loans is not adequately supported. The Bureau's determination was primarily extrapolated from its own interpretation of limited data from the Mann study. In support of its finding of lack of understanding, the 2017 Final Rule emphasized that "consumers who experience long sequences of loans often do not expect those long sequences to occur when they make their initial borrowing decision."[163] In its reasonable avoidability analysis, the 2017 Final Rule did not significantly rely on other evidence of consumer understanding with respect to covered loans. The 2017 Final Rule's broad pronouncement about consumer understanding is based on evidence that goes to the different question of whether consumers can predict their individual likelihood of reborrowing, rather than to the question of whether consumers understand the magnitude and likelihood of risk of harm associated with covered loans sufficient for them to anticipate that harm and understand the necessity of taking reasonable steps to prevent resulting injury. Thus, the evidence that the 2017 Final Rule presented on consumer understanding does not satisfy the reasonable avoidability analysis pursuant to the Bureau's better interpretation of section 1031(c)(1)(A).

[162] The Bureau does not make any comment as to the appropriate evidentiary standard that would apply to unfairness citations or claims brought through the enforcement or the supervisory process.

[163] 82 FR 54472, 54617.

The Bureau concludes that other studies, such as the Martin study,[164] which found that most consumers cannot identify the precise APR or dollar cost of their payday loans, only suggest a lack of understanding as to specific features of payday loans. These studies do not ask the direct and relevant question of whether consumers understand the magnitude and likelihood of risk of harm associated with covered loans sufficient for them to anticipate that harm and understand the need to take steps to avoid injury.

Other lender behavior or structural or behavioral factors that can impact consumer understanding do not bear on the reasonable avoidability of the identified practice. Citing, among other things, Bureau enforcement and supervisory activities, numerous commenters identified covered lender behavior that may cause consumer harm or hinder consumer choice. The behavior that allegedly produces these effects included steering borrowers into unaffordable reborrowing, preventing borrowers from self-amortizing, engaging in deceptive advertising or marketing, and failing to comply with State laws. The Bureau notes that, depending on the facts and circumstances, some of this behavior could violate Federal consumer financial law. The Bureau has cited covered lenders for similar acts or practices in the past.[165] But there can be unlawful or harmful practices by some market participants in all markets, and that does not establish that other practices—specifically here lenders' failure to assess the ability to repay—in those markets is unlawful. The Bureau concludes that the existence of other practices in the markets for covered loans that could be harmful to consumers or violate other laws does not

[164] Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 Ariz. L. Rev. 563 (2010). This study is discussed further below.

[165] *See, e.g.*, *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 3:17-cv-00101-RDM (M.D. Penn. Jan. 18, 2017), *https://www.consumerfinance.gov/documents/2297/201701_cfpb_Navient-Pioneer-Credit-Recovery-complaint.pdf*. The Bureau has also filed lawsuits against payday lenders for deceptive advertising. *See, e.g.*, Press Release, Bureau of Consumer Fin. Prot., *CFPB Takes Action Against Moneytree for Deceptive Advertising and Collection Practices* (Dec. 16, 2016), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-moneytree-deceptiveadvertising-and-collection-practices/*.

establish that the harm from a lender's decision to lend without assessing a borrower's ability to repay is itself not reasonably avoidable.

Further, the Bureau declines to infer from the conclusion that making payday loans without assessing the ability to repay causes or is likely to cause substantial injury (a conclusion from the 2017 Final Rule the Bureau assumed to be correct for purposes of the unfairness analysis in the 2019 NPRM) the further conclusion that consumers cannot reasonably avoid that injury. While the same facts in a rulemaking record may support conclusions as to each of the three elements of unfairness, to identify a practice as unfair the Bureau must separately analyze and find adequate support for each of these three elements. As discussed above, the Bureau based its conclusion on the evidence in the record that was the most direct and most probative on the question of reasonable avoidability. Having done so, the Bureau declines to rely on indirect and less probative evidence, including that drawn from inferences as some commenters have suggested.

The Bureau also declines to follow recommendations that it give further consideration to behavioral factors. The 2017 Final Rule considered whether behavioral economics factors make it difficult for consumers to understand the implications of taking out a covered loan.[166] However, these considerations did not form an independent basis for the 2017 Final Rule and, as set out in the 2019 NPRM, the Bureau need not address them.

[166] The Bureau in the 2017 Final Rule cited research stating that certain consumer behaviors may make it difficult for them to predict accurately the future implications of taking out a covered short-term or longer-term balloon-payment loan. As the Bureau made clear, however, this research helped to explain the Bureau's findings from the Mann study but was not in itself an independent basis to conclude that consumers do not predict whether they will remain in reborrowing sequences. 82 FR 54472, 54571 (explaining that "[r]egardless of the underlying explanation, the empirical evidence indicates that many borrowers who find themselves ending up in extended loan sequences did not expect that outcome").

With respect to the 2019 NPRM's preliminary determination that goes beyond withdrawing the 2017 Final Rule's reasonable avoidability determination and posited that consumers affirmatively have the requisite understanding of the likelihood and magnitude sufficient for any harm to be reasonably avoidable, the Bureau has decided it is not necessary to finalize this determination. As discussed above, the Bureau has concluded that robust and reliable evidence in the rulemaking record does not support the 2017 Final Rule's determination that payday borrowers cannot reasonably avoid substantial injury from lenders not assessing their ability to repay their loans.

Accordingly, the Bureau concludes that the Mandatory Underwriting Provisions at 12 CFR part 1041 must be revoked in light of the Bureau's determination to revoke the 2017 Final Rule's finding that consumers lack sufficient understanding of the likelihood and magnitude or risks of covered loans such that they cannot reasonably avoid substantial injury from lenders making covered short-term and longer-term balloon-payment loans without assessing borrowers' ability to repay.

Final Rule—Means to Avoid Harm

As explained above, the revised reasonable avoidability standard adopted by the Bureau in this final rule requires that covered loan borrowers have an understanding of the likelihood and magnitude of risks of harm associated with payday loans sufficient for them to anticipate those harms and understand the necessity of taking reasonable steps to prevent resulting injury. The requirement that consumers "understand the necessity of taking reasonable steps to prevent injury" presupposes that reasonable steps exist and are available to the consumer, *i.e.*, there are practical means to avoid harm. The Bureau concludes that the evidence in the record does not support the conclusion in the 2017 Final Rule that, even assuming consumers were adequately aware of the risk of substantial injury from the failure of lenders to assess their ability to repay, consumers could not take reasonable steps to prevent or mitigate that injury. The Bureau reaches this conclusion in part based on the fact that consumers continue to have access to short-term credit in States where covered loans are prohibited or severely restricted as well as on the expanding availability of alternatives to payday and other covered loans in the marketplace.

The 2017 Final Rule found that "once borrowers find themselves obligated on a loan they cannot afford to repay," the resulting injury is "generally not reasonably avoidable *at any point thereafter*," because after that point the relevant long-term borrowers lack the means to avoid injury.[167] The Bureau has not sought to reconsider that determination in this rulemaking. However, the 2017 Final Rule did not assert that that determination was by itself *sufficient* to support its finding that injury was not reasonably avoidable *overall*. It is well-established that consumers can reasonably avoid injury through either "anticipatory avoidance" or "subsequent mitigation," so a finding that consumers lack the means to avoid injury at a later time is not generally sufficient if they could do so at an earlier time.[168] And the 2017 Final Rule did not rest its reasonable avoidability analysis on a finding that consumers lack the means to avoid injury before they have taken out any covered loans. Instead, the 2017 Final Rule explained that the "heart of the matter here is consumer perception of risk," and whether borrowers are in a position before taking out covered loans "to gauge the likelihood and severity of the risks they incur."[169] It is that critical issue from the 2017 Final Rule that the 2019 NPRM reconsidered.

[167] 82 FR 54472, 54598 (emphasis added).

[168] *Orkin Exterminating Co.*, 849 F.2d at 1365 (quoting *Orkin Exterminating Co.*, 108 F.T.C. at 366).

[169] 82 FR 54472, 54597.

The Bureau does not find persuasive these arguments in these comments that before consumers have taken out any payday loans they lacked the ability to take reasonable steps to avoid injury from the lenders' failure to assess their ability to repay.

Consumers generally have viable alternatives to payday loans, which is evidenced by the fact that millions of consumers live in States where covered loans are prohibited or severely restricted and these consumers obtain access to other alternative forms of credit.[170] Evidence submitted by commenters that payday loan alternatives are consistently expanding are persuasive and confirmed by the Bureau's market monitoring. These alternatives include credit offered by fintechs, credit unions, and other mainstream financial institutions.[171] Consistent with their incentive to make a profit, creditors who offer products that compete with payday loans engage in marketing and advertising to make consumers aware of the availability of their products.

Consumers do not lack the practical ability to take advantage of these alternatives. Arguments based on behavioral factors that attempt to explain why borrowers may not seek out readily available covered loan alternatives are hypothetical and do not compellingly rebut available real-world evidence to the contrary. Further, that consumers may choose payday and other covered loans over other credit options because payday loans are ubiquitous and

---

[170] *See* discussion at part II.A.1. For example, Colorado is one State where payday loans are restricted. Following its reform, the number of payday lenders in Colorado substantially contracted, but the lending volume remained stable and the cost of loans dropped. *See* Pew Charitable Trusts, *Trial, Error, and Success in Colorado's Payday Lending Reforms* (Dec. 2014), https://www.pewtrusts.org/~/media/assets/2014/12/pew_co_payday_law_comparison_dec2014.pdf.

[171] *See, e.g.*, Fin. Health Network, *Financially Underserved Market Size Study 2019*, at 6 (2019), https://finhealthnetwork.org/research/2019-financially-underserved-market-size-study/ (noting the transition in small-dollar credit markets away from payday and title loans toward installment loans); CURO Group, *Presentation at Jefferies Consumer Finance Summit*, at 9 (Dec. 2018), https://ir.curo.com/events-and-presentations (19 percent of a prominent payday lender's revenue came from multi-payment loans in 2010, but by the third quarter of 2018, that figure had quadrupled to 77 percent); Pew Charitable Trusts, *From Payday to Small Installment Loans: Risks, Opportunities, and Policy Proposals for Successful Markets* (Aug. 2016), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/08/from-payday-to-small-installment-loans (noting that non-bank small-dollar lenders already offered installment loans in 26 of 39 States where they operated).

convenient is not evidence of a lack of alternatives. It is consistent with some consumers preferring payday or other covered loans based on speed and convenience of the borrowing process, easy loan approval, the ability to take out a loan without a traditional credit check, or other considerations as some commenters suggested.

And contrary to some comments, the Bureau's approach would not make any harm reasonably avoidable simply because a consumer can decline a product or service. The small-dollar loan market is not comparable to the circumstances addressed in *AFSA*, where the court found that industry-wide use of boilerplate provisions prevented consumers from making meaningful efforts to identify alternatives that did not feature those provisions.[172] Consumers in the market for covered loans do not face a take-it-or-leave-it choice; they can potentially access formal credit options with varied terms and conditions and other informal credit options, such as borrowing from family and friends.[173]

Regarding comments that consumers cannot avoid injury after they take out a loan, are trapped in an extended sequence, and are unable to repay, the Bureau acknowledges, as it did in the 2017 Final Rule, that some borrowers in extended sequences suffer financial harm. But the identified unfair practice pertains to lender conduct when borrowers are making an initial decision to take out a new loan. The fact that some subgroup of borrowers may have limited options at a later point in a repayment cycle does not negate the fact that all consumers had alternatives to covered loans before taking out an initial loan, which is the relevant inquiry where the identified practice and related rule provisions apply to all covered loans to all consumers.

---

[172] *AFSA*, 767 F.2d at 977.

[173] *See* Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why*, at 16-28, https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.

Conclusion

Accordingly, as discussed above, the Bureau is withdrawing the conclusion in the 2017 Final Rule that any substantial injury from lenders making covered short-term and longer-term balloon-payment loans without assessing borrowers' ability to repay the loan according to its terms is not reasonably avoidable.

2. Reconsidering the Evidence for the Factual Analysis of Reasonable Avoidability in Light of the Impacts of the Mandatory Underwriting Provisions

The Bureau has decided to adopt a different, better interpretation of the level of understanding that payday borrowers need in order to reasonably avoid injury, as discussed in part V.B.1. But independent of that interpretive question, the Bureau has concluded that it should withdraw the 2017 Final Rule's determination regarding reasonable avoidability because it was supported by insufficiently robust and reliable evidence. The Bureau believes that more robust and reliable evidence for this key determination should be required, in light of the impacts of the Mandatory Underwriting Provisions would have on the market.

a. Background on the Impacts of the Mandatory Underwriting Provisions

Before reconsidering the evidence supporting the 2017 Final Rule's determinations below in parts V.B.2.c and V.B.2.d, the Bureau discusses the dramatic impacts of the Mandatory Underwriting Provisions that give rise to the Bureau's application of the robust and reliable evidence standard. The Bureau stated and explained in the 2019 NPRM its preliminary belief that the Mandatory Underwriting Provisions would have "dramatic impacts" on the market.[174] As the 2019 NPRM explained, the section 1022(b)(2) analysis for the 2017 Final Rule observed that the primary impacts of the Rule on covered persons derived mainly from the restrictions on

[174] 84 FR 4252, 4264.

who could obtain payday and single-payment vehicle title loans and the number of such loans that could be obtained. To simulate the impacts of the Mandatory Underwriting Provisions, the section 1022(b)(2) analysis for the 2017 Final Rule assumed, on the basis of a number of studies by the Bureau and outside researchers concerning payday borrowers, that only 33 percent of current payday and vehicle title borrowers would be able to satisfy the Rule's ability-to-repay requirements when initially applying for a loan and that for each succeeding loan in a sequence only one-third of borrowers would satisfy the mandatory underwriting requirement (*i.e.*, 11 percent of current borrowers for a second loan and 3.5 percent for a third loan).[175] Applying these assumptions to data with respect to current patterns of borrowing and reborrowing, the section 1022(b)(2) analysis estimated that, absent the principal step-down exemption in § 1041.6, the Mandatory Underwriting Provisions of the Rule would reduce payday loan volume and lender revenue by approximately 92 to 93 percent relative to lending volumes in 2017 and vehicle title volume and lender revenue by between 89 and 93 percent.[176] Factoring in the expected effects of the novel principal step-down exemption, and assuming that payday lenders would endeavor to take full advantage of that novel exemption before seeking to qualify consumers for a loan under the mandatory underwriting requirements of § 1041.5, the analysis estimated that the Mandatory Underwriting Provisions would result in a decrease in the number of payday loans of 55 to 62 percent and, because of the step-down feature of the principal step-down exemption, a decrease in payday lender revenue of between 71 and 76 percent.[177]

[175] 82 FR 54472, 54826-34.

[176] *Id.* at 54826, 54834.

[177] *Id.* at 54826. Given that short-term vehicle title loans are not eligible for the principal step-down exemption, the analysis estimated that the Mandatory Underwriting Provisions would result in a decrease in the number of short-term vehicle title loans of between 89 and 93 percent, with an equivalent reduction in loan volume and revenue. *Id.* at 54834.

The section 1022(b)(2) analysis that accompanied the 2017 Final Rule stated that these revenue impacts would have a substantial effect on the market. The analysis projected that unless lenders were able to replace their reduction in revenue with other products, there would be a contraction in the number of storefronts of similar magnitude to the contraction in revenue, *i.e.*, a contraction of between 71 and 76 percent for storefront payday lenders and of between 89 and 93 percent for vehicle title lenders.[178]

The section 1022(b)(2) analysis for the 2017 Final Rule identified a number of impacts that the Mandatory Underwriting Provisions would have on consumers' ability to access credit. Specifically, the analysis estimated that approximately 6 percent of existing payday borrowers would be unable to initiate a new loan because they would have exhausted the loans permitted under the principal step-down exemption and would not be able to satisfy the ability-to-repay requirement.[179] The section 1022(b)(2) analysis that accompanied the 2017 Final Rule identified, but did not quantify, certain other potential impacts of the Mandatory Underwriting Provisions on consumers' access to credit. Consumers seeking to borrow more than $500 after the 2017 Final Rule's compliance date may find their ability to do so limited because of the cap on the initial loan amount under the principal step-down exemption and because of the impact of the Rule on vehicle title loans, which tend to be for larger amounts.[180] Additionally, because of the principal step-down feature of the exemption, consumers obtaining loans under that exemption would be forced to repay their loans more quickly than they are required to do today.

---

[178] *Id.* at 54835.

[179] *Id.* at 54840. Vehicle title borrowers would be more likely to be unable to obtain an initial loan because the principal step-down exemption does not extend to such loans. *Id.* The analysis noted that while those borrowers could pursue a payday loan, there are three States that permit some form of vehicle title loans (either single-payment or installment) but not payday loans and that 15 percent of vehicle title borrowers do not have a checking account and thus may not be eligible for a payday loan. *Id.*

[180] *Id.* at 54841.

The analysis stated that 40 percent of the reduction in payday revenue estimated to result from the Mandatory Underwriting Provisions would be the result of the cap on loan sizes under the principal step-down exemption and the remainder would be the result of the restriction on the number of loans available to consumers under that exemption coupled with the mandatory underwriting requirement for any additional loans.[181] Finally, the analysis concluded, based on research concerning the implementation of various State regulations, that although the reduction in the number of storefronts would not substantially affect consumers' geographic access to payday locations in most areas, a small share of potential borrowers would lose easy access to stores.[182]

The section 1022(b)(2) analysis that accompanied the 2017 Final Rule went on to observe that consumers who are unable to obtain a new loan because they cannot satisfy the Rule's mandatory underwriting requirement or cannot qualify for a loan under the principal step-down exemption will have reduced access to credit. They may be forced at least in the short term to forgo certain purchases, incur high costs from delayed payment of existing obligations, incur high costs and other negative impacts by defaulting on bills, or they may choose to borrow from sources that are more expensive or otherwise less desirable.[183] Some borrowers may overdraft their checking accounts; depending on the amount borrowed, an overdraft on a checking account may be more expensive than taking out a payday or single-payment vehicle title loan.[184]

---

[181] *Id.*

[182] *Id.* at 54842 & n.1224. Research conducted by the Bureau had found that in one State where regulatory restrictions resulted in a substantial contraction of payday stores, the median distance between stores in counties outside of metropolitan areas increased from 0.2 miles to 13.9 miles. Supplemental Findings at 87.

[183] *See* 82 FR 54472, 54841.

[184] *Id.*

Similarly, "borrowing" by paying a bill late may lead to late fees or other negative consequences like the loss of utility service.[185]

b. The Bureau's Decision to Require Robust and Reliable Evidence of the Reasonable Avoidability Element in Light of the Potential Dramatic Impacts of the Mandatory Underwriting Provisions at 12 CFR part 1041

The Bureau's Proposal

As explained above, were compliance with the Mandatory Underwriting Provisions of the 2017 Final Rule to become mandatory,[186] the provisions would have the effect of eliminating most covered short-term and longer-term balloon-payment loans. In the 2019 NPRM, the Bureau stated its preliminary view that if a rule could have such dramatic impacts on consumer choice and access to credit, then it would be reasonable under the Dodd-Frank Act and prudent to have robust and reliable evidence to support the key finding that consumers cannot reasonably avoid injury (for purposes of the unfairness standard in Dodd-Frank Act section 1031(c)).[187] Similarly, the 2019 NPRM set forth the Bureau's preliminary view that it would be reasonable under the Dodd-Frank Act and prudent to have robust and reliable evidence to support key findings of consumers' lack of understanding (for purposes of the abusiveness standard in Dodd-Frank Act section 1031(d)(2)(A)) and inability to protect their own interests (for purposes of the abusiveness standard in section 1031(d)(2)(B)).[188]

---

[185] *Id.*

[186] As noted above, the Bureau published in June 2019 a final rule delaying the compliance date for the Mandatory Underwriting Provisions to November 19, 2020. *See* 84 FR 27907.

[187] 84 FR 4252, 4264.

[188] *Id.*

Comments Received

In comments on the 2019 NPRM, consumer groups and others stated that the 2017 Final Rule will not have a dramatic impact on consumers' access to credit, because loan providers will respond to the rule by shifting from providing short-term loans to providing longer-term installment loans, which are not covered by the 2017 Final Rule's Mandatory Underwriting Provisions.[189]

Industry commenters and others stated that a shift from short-term loans to longer-term installment loans would itself be a dramatic impact on how credit is provided, consumer choice, and consumer access to credit, sufficient to justify the Bureau's policy decision to adopt the robust and reliable standard. These commenters also noted that payday loans have traditionally been regulated by State law, and the 2017 Final Rule therefore raises federalism issues. These commenters stated that these federalism issues constitute another reason to require robust and reliable evidence in support of the 2017 Final Rule.

Consumer group commenters and others stated that the 2017 Final Rule is a final rule adopted by the Bureau and, as such, is now the baseline for determining the impact of Bureau rulemakings on a going-forward basis. And, they stated, revoking the 2017 Final Rule is itself a full rulemaking action that has the same magnitude of impact as the 2017 Final Rule, except in the opposite direction. They reason that the Bureau cannot finalize the 2019 NPRM unless the evidence on which the Bureau now relies satisfies the "robust and reliable" standard the Bureau cited in the 2019 NPRM for re-evaluating the evidence supporting the 2017 Final Rule. Further, these commenters stated, the 2019 NPRM did not provide evidence sufficient to support

[189] Notably, these comments from consumer groups support the Bureau's point in part V.B.1 above that consumers in these markets have alternatives to payday loans and as a result have the means to avoid any harm from the loans.

revocation of the Mandatory Underwriting Provisions pursuant to the rulemaking requirements of the APA, and that action would, if finalized, be arbitrary and capricious under the APA.

Consumer groups and others also stated that a Bureau determination to require robust and reliable evidence for rules that have a dramatic impact on consumer choice and access to credit will make it harder for the Bureau to adopt consequential rules addressing consumer harm in the future.

Final Rule

After reviewing the comments received, the Bureau finds that its preliminary determination that the Mandatory Underwriting Provisions of 12 CFR part 1041 would eliminate most covered short-term and longer-term balloon-payment loans was correct. The Bureau also concludes that eliminating such loans would have a dramatic impact on consumer choice and access to credit. Accordingly, the Bureau determines that the 2017 Final Rule would have a dramatic impact on consumer choice and access to credit that consumers prefer.

In light of this dramatic impact, the Bureau determines that it is reasonable and prudent to have robust and reliable evidence to support the key finding that consumers cannot reasonably avoid injury (for purposes of the unfairness standard in Dodd-Frank Act section 1031(c)). Similarly, the Bureau determines that it is reasonable and prudent to have robust and reliable evidence to support key findings of about consumers' lack of understanding (for purposes of the abusiveness standard in Dodd-Frank Act section 1031(d)(2)(A)) and inability to protect their own interests (for purposes of the abusiveness standard in section 1031(d)(2)(B)). Those abusiveness determinations are further addressed in part VI below.

In making these determinations, the Bureau has not relied upon the federalism concerns about the 2017 Final Rule raised by some commenters. (Of course, the effect of the Bureau's decision to revoke the Mandatory Underwriting Provisions for the reasons set forth herein is to leave existing State approaches in place, some of which reflect a preference to allow their citizens' access to payday loans.)

The Bureau does not agree with some commenters' characterization of the Bureau's policy choice in requiring robust and reliable evidence as being arbitrary and capricious. The Bureau makes this policy choice in the context of Dodd-Frank Act section 1031(c)(1)(A), which provides that the Bureau cannot identify an unfair practice unless there is substantial injury that is "not reasonably avoidable by consumers." As the 2019 NPRM notes, this element is premised on the fact that "[n]ormally we expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market."[190] As a policy matter, the Bureau believes that this principle of respecting consumer choice is especially important where, as here, regulatory action by the Bureau could result in dramatic impacts on consumer choice and access to the credit that consumers prefer. Thus, in exercising the Bureau's discretion to determine whether there is sufficient evidence that consumers cannot reasonably avoid injury here, the Bureau believes that such evidence should be robust and reliable. (And, although abusiveness is a much newer standard than unfairness, the Bureau believes that similar reasoning applies in this rulemaking to abusiveness' "lack of understanding" and "inability to protect" elements. Those abusiveness elements are similarly threshold determinations of consumer vulnerability that must be made before regulatory intervention is appropriate. The Bureau discusses those abusiveness elements in part VI.C below.) In doing so, the Bureau need not and has not attempted to provide an abstract definition of the terms "robust" or "reliable" beyond

[190] *See* FTC Unfairness Policy Statement, *Int'l Harvester*, 104 F.T.C. at 1074.

their commonly understood meanings. The measure of whether evidence is robust and reliable is whether, as a practical matter, the evidence gives the Bureau a level of confidence in the Bureau's conclusion that is commensurate with the dramatic impacts on consumer choice and access to credit that are at stake here.

The Bureau disagrees with the argument by some commenters that requiring robust and reliable evidence in this context will make it harder for it to adopt consequential rules addressing consumer harm in the future. In this final rule, the Bureau has made a determination to require robust and reliable evidence to satisfy the "not reasonably avoidable," "lack of understanding," and "inability to protect" elements in the context of regulatory provisions that would have a dramatic impact on consumer choice and access to credit. The policy considerations underpinning this rulemaking might, or might not, be relevant to evaluation of the evidence in future Bureau rules. The Bureau has made this determination consistent with the requirements of the Administrative Procedure Act and the evidentiary record and is explaining its basis for that determination after a full notice-and-comment process.

The comments suggesting that the Bureau needs to have robust and reliable evidence to prove that consumers *can* reasonably avoid injury in order to finalize this rule misunderstand the Bureau's approach. The Bureau is reconsidering the evidentiary basis for its prior determination that consumers cannot reasonably avoid injury, not seeking to establish that consumers can reasonably avoid injury. Further, this approach is entirely consistent with the statutory scheme. Under that scheme, consumers' choices in the marketplace are respected, absent a determination that they cannot reasonably avoid injury. And the Bureau's policy of requiring robust and reliable evidence is based on caution about potentially interfering with consumers' decision-making in the payday market on a massive scale.

Nor are commenters correct that the Bureau is violating the APA by not offering sufficient *new* evidence in support of this final rule. The Bureau is reconsidering the conclusions regarding unfairness (and abusiveness) that it previously drew from the evidentiary record, and the Bureau is explaining the basis for that reconsideration after a full notice-and-comment process, consistent with the APA. Under section 1031 of the Dodd-Frank Act, consumers' choices in the marketplace are respected, absent a threshold determination that they cannot reasonably avoid injury (or lack understanding or are unable to protect their own interests).

c. The Mann Study and the Findings Based on It

The Bureau's Proposal

In the 2019 NPRM, the Bureau preliminarily found that the 2017 Final Rule's interpretation of limited data from the Mann study was not sufficiently robust and reliable, in light of the 2017 Final Rule's dramatic impacts in restricting consumer access to payday loans, to be the linchpin for the 2017 Final Rule's conclusion that consumers could not reasonably avoid harm. Specifically, this limited data does not support the determination that many payday loan consumers lack a specific understanding of their personal risks and cannot accurately predict how long they will be in debt after taking out covered short-term or longer-term balloon-payment loans.[191]

The 2019 NPRM preliminarily found that the Bureau's interpretation of limited data from the Mann study was not sufficiently reliable because the Mann study involved a single payday

[191] The 2017 Final Rule's finding that consumers do not have a specific understanding of their personal risks of reborrowing was a necessary predicate to its determination that consumers cannot reasonably avoid the substantial injury that the 2017 Final Rule asserted that consumers incur from payday loans (per the unfairness standard set forth in Dodd-Frank Act section 1031(c)(1)(A)). The finding was also a necessary predicate to the 2017 Final Rule's determination that consumers do not understand the material risks, costs, or conditions of such loans (per the abusiveness standard set forth in Dodd-Frank Act section 1031(d)(2)(A)).

lender in just five States and was administered at a limited number of locations.[192] The 2019 NPRM stated that a study focusing on a single lender or limited number of lenders may not be representative of the variety of payday lenders across the United States. In addition, it stated, these five States also are not necessarily representative of payday lending nationally.[193] Because consumer understanding and expectations may be informed by the information consumers are provided—and because that information can vary from lender to lender and State to State[194]—the 2019 NPRM preliminarily concluded that the Bureau's interpretation of limited data from the Mann study is not a sufficiently robust and reliable basis to make general findings about all lenders making payday loans to all borrowers in all States.

Comments Received

Industry commenters and others stated that the single lender and the five States represented in the limited data from the Mann study are not representative of payday lending nationally and that the Bureau's interpretation of that data is not sufficiently robust and reliable to serve as the basis for findings about all lenders and all borrowers in all States. These commenters (including Professor Mann himself) also stated that the 2019 NPRM correctly interpreted the Mann study as indicating that most payday loan consumers have a reasonable understanding of their loans. They also stated that, because longer-term reborrowers are

---

[192] *See* Mann study at 116.

[193] The Mann study noted that rollover loans are technically prohibited in all five of the States in which payday borrowers were surveyed. *Id.* at 114. Further, same-day rollover transactions are not possible in Florida, which has a 24-hour cooling-off period, and are limited in Louisiana, which permitted rollovers only upon partial payment of the principal. *Id.* Over half of the survey participants were in Florida and Louisiana alone. *Id.* at 117 & tbl. 1.

[194] 82 FR 54472, 54486 (identifying detailed disclosures required of payday lenders under Texas law), and *id.* at 54577 (noting that some jurisdictions require lenders to provide specific disclosures in order to alert borrowers of potential risks).

typically more financially distressed consumers, it is plausible that they are more constrained in their credit options and less able to accurately predict when or if they can repay a loan. Thus, even if longer-term borrowers generally have the same level of understanding of the costs and risks of payday loans as shorter-term borrowers, their predictions of their loan-sequence length will reflect a greater amount of error than will those of shorter-term borrowers.[195]

Consumer group commenters and others stated that the Mann study is sufficiently robust and reliable to support the conclusion that consumers cannot reasonably avoid harm from the identified practice, for the following reasons. First, lenders tend to be uniform in relevant ways: loan structure, marketing, encouragement of rollovers, and concentration of revenue from those borrowers who engage in extended loan sequences. Also, these commenters stated, the Mann study itself notes that the payday loan products of the one lender the study involved are typical of large storefront lenders. Thus, they said, the fact that the Mann study involved a single lender is not necessarily problematic. Second, the five States included in the study comprise over a quarter of the nation's payday loan market. The five States account for over $1 billion in payday fees annually or roughly 27 percent of total fees collected by payday lenders each year. Further, the population of these five States represents 32 percent of the population of the States that authorize payday lending. Third, the Mann study itself discusses the five States' rollover bans

---

[195] Additionally, at least one commenter stated that the Mann study participants with long loan sequences were only 12 percent of sampled borrowers, or 62 people, and that that number was not an adequate sample to support the 2017 Final Rule's position that consumers lack understanding of payday loans. However, the share of borrowers who gave an answer to how long they expected to borrow is not relevant, because all consumers who ended up in sequences more than 200 days long failed to make a numeric prediction at the beginning of their debt cycle. Further, these commenters were incorrect as factual matter. Specifically, the actual number of borrowers in question was 12 percent of the 1,300 borrowers sampled, or about 156 borrowers (plus the consumers in sequences more than 200 days long, none of whom provided responses). The commenter improperly multiplied that 12 percent of 1,300 (or 156) by 40 percent, which was the 40 percent of borrowers who said they expected to continue borrowing after their current loan's initial due date.

and crafts its survey question to control for the fact that the States prohibited rollovers. Fourth, rollover bans are common in payday loan States and the bans do not change consumer behavior;[196] it is therefore unlikely that they would affect the accuracy of consumers' predictions. And fifth, consumer group commenters stated that the Bureau could have tested the representativeness of the data from the Mann study by reviewing data in its possession. Specifically, these commenters said, the Bureau has loan-level data from multiple lenders and should have analyzed whether or not sequence lengths or renewal rates vary significantly across lenders before asserting that consumer outcomes at one lender's outlets are not representative. These commenters noted that the Bureau's March 2014 payday lending data point analyzed borrower outcomes across States with different restrictions on rollovers and found virtually no difference in renewal rates between States that had no restrictions and those that either prohibited rollovers or required waiting periods between loans. These findings, the commenters stated, indicate that greater geographic coverage beyond the five States in question would not have led to different findings than using the data from the Mann study.

With respect to the substantive question at issue—whether the Bureau's interpretation of data from the Mann study indicates that payday loan consumers do not have a specific understanding of their personal risks and cannot accurately predict how long they will be in debt—consumer group commenters acknowledged that the Mann study found that consumers of payday loans are generally able to predict in advance the length of the payday loan sequence that they are entering into, a finding they stated is largely driven by the fact that many study

[196] The commenters stated that approximately 16 States ban rollovers (approximately half of the States that permit short-term payday lending) while approximately another 10 States limit rollovers or have similar restrictions. They further stated that rollover bans and short cooling-off periods between loans demonstrably have little impact on reborrowing rates. And, rollover bans are particularly irrelevant in the five States in the Mann study, because none of those States has a meaningful cooling-off period, meaning that their ban on rollovers has particularly little effect limiting long loan sequences.

participants accurately predicted that they would not remain in debt for longer than one or two loans. Consumer groups stated, however, that the 2017 Final Rule's analysis relied on a portion of the Mann study data that, they stated, indicates that consumers with long payday loan sequences did not accurately predict those sequences in advance. That is, consumer groups argued that it was proper for the Bureau's interpretation of data from the Mann study to focus on a portion of the data as evidence that consumers with long loan sequences do not have a specific understanding of the risks posed to them by payday loans.

Finally, consumer group commenters stated that the other evidence cited by the 2019 NPRM as casting doubt on the Bureau's interpretation of data from the Mann study was itself dubious or not applicable to payday borrowers. These commenters also sought to rebut the other evidence cited by the 2019 NPRM. Even if this other evidence were valid, these commenters asserted that it does not undermine the 2017 Final Rule's findings based on the Bureau's interpretation of data from the Mann study.

Final Rule

The Bureau has determined that the interpretation of the limited data from the Mann study in the 2017 Final Rule is not sufficiently robust and reliable to serve as the primary factual support for the Bureau's determination in that Rule that many payday loan consumers do not have a specific understanding of their personal risks and cannot accurately predict how long they will be in debt when they take out covered short-term or longer-term balloon-payment loans. In light of the dramatic impacts the Mandatory Underwriting Provisions would have in restricting consumer access to payday loans, the Bureau has determined that a more solid foundation is needed.

As a preliminary matter, the Bureau does not dispute, and did not dispute in the 2019 NPRM, that the 2017 Final Rule relied on limited data from the Mann study that pertained to the predictions of consumers who engage in long sequences of payday loans, and that the Bureau's interpretation of that data suggests that some of those consumers may not accurately predict their outcomes. At the same time, the Bureau also believes that the Mann study's data overall indicates that payday borrowers in general—*i.e.*, including consumers who engage in short sequences of payday loans—are able to predict the length of their loan sequences with reasonable accuracy. Again, as discussed above, the identified practice and the corresponding Mandatory Underwriting Provisions apply to payday borrowers in general, not just payday borrowers who engage in long sequences of payday loans.

It may be true, as industry commenters argued, that borrowers who engage in long sequences of payday loans generally have the same level of understanding of the costs and risks of payday loans as shorter-term borrowers, but that these borrowers' predictions of their loan-sequence length nonetheless are less accurate than those of shorter-term borrowers. This would be because, in essence, the level of difficulty of predicting loan-sequence length is higher for borrowers who turn out to be longer-sequence borrowers than it is for borrowers who turn out to be shorter-sequence borrowers. Nonetheless, accepting the 2017 Final Rule's approach to the legal standard for reasonable avoidability for present purposes (although the Bureau reconsiders that issue in part V.B.1), the relevant issue here is whether these consumers lack a *specific* understanding of their personal risks. That they may have the same general understanding of the loans' costs and risks as shorter-term payday loan borrowers would not affect the 2017 Final Rule's interpretation of limited data from the Mann study to find that longer-term reborrowers were not accurately predicting their outcomes, which may suggest they lack specific understanding of their personal risks from payday loans.[197]

The Bureau has determined that the Mann study, based on a single lender operating in only five States, is not sufficiently robust and reliable to serve as the basis for making findings of unfair practices that are applicable nationwide to all lenders making payday loans to borrowers in all States. Moreover, the Bureau's interpretation of the data from the Mann study was based on 156 respondents plus the 19 percent of the 1,326 surveyed borrowers who did not respond to the relevant question, which was 254 respondents, for a total of 410 respondents. These figures represent a miniscule portion of the up to approximately 12 million consumers in the United States who take out a payday loan in a given year.[198] Consumer groups' assertions about the single lender being a typical lender and about the five States being significant payday lending States do not indicate that the limited data from the Mann study the Bureau used is nationally representative. Instead, the comments merely suggest it is possible that the Bureau's interpretation of limited data from the Mann study is not *un*representative. In light of the dramatic impacts of the 2017 Final Rule, the Bureau has concluded that its determination of lack of understanding as a predicate to finding that harm is not reasonably avoidable should be based on data and analysis thereof that is nationally representative.[199]

---

[197] The issue of whether the 2017 Final Rule's used the best legal standard is discussed in part V.B.1. As stated there, the Bureau has determined that the best legal standard is whether consumers lack an understanding of the magnitude and likelihood of risk that is sufficient to alert them of the need to take steps to protect themselves from the harm from taking out such loans. The 2017 Final Rule did not use that better standard—it required only finding a lack of specific ability to predict their individual likelihood of risk of lengthy reborrowing, rather than finding that consumers lack a sufficient understanding to alert them of the need to take steps to protect themselves from the harm from taking out such loans. The use of the other legal standard is an independent basis for the Bureau's present determination to revoke the 2017 Final Rule; *i.e.*, it is separate from the basis for revocation that is discussed here.

[198] *See* Pew Charitable Trusts May 2016 Factsheet, *Payday Loan Facts and the CFPB's Impact*, *https://www.pewtrusts.org/-/media/assets/2016/06/payday_loan_facts_and_the_cfpbs_impact.pdf*.

[199] As stated in part VI.C.1.b.(2) below, the Bureau has reached the same conclusion regarding its evidentiary basis for determining lack of understanding in the abusiveness context.

Consumer group commenters argued that data the Bureau analyzed and reported on in its March 2014 data point should enable the Bureau to ascertain whether consumer outcomes at the one lender's outlets are representative. However, these consumer outcomes are not relevant to the issue of whether the limited data at issue are sufficiently nationally representative concerning consumers' understanding of the magnitude and likelihood of risks associated with their loans (as opposed to predicting their ultimate outcomes with those loans, such as length of reborrowing). And, for the reasons stated above, the Bureau has determined that its prior interpretation of limited data from the Mann study was based on data that is not sufficiently nationally representative. As the 2019 NPRM explained, consumers using loans from other lenders or in other places might not have the same understanding as those in the Mann study. Because consumer understandings and expectations may be informed by the information consumers are provided—and because that information can vary from lender to lender and State to State—the Bureau has concluded that the 2017 Final Rule's interpretation of limited data from the Mann study is not a sufficiently robust and reliable basis to make nationwide findings about consumer understanding at all lenders making payday loans to all borrowers in all States.

Finally, regarding consumer group commenters' criticisms of the other evidence the 2019 NPRM cited as casting doubt on the 2017 Final Rule's Mann data analysis, the 2019 NPRM cited this evidence merely to corroborate the Bureau's concerns about its interpretation of limited data from the Mann study. However, the Bureau would reach the same conclusion about its prior use of the limited data from the Mann study without that evidence. The Bureau's determination regarding the lack of robustness and reliability of how the 2017 Final Rule used the Mann study is not dependent upon the other evidence cited by the 2019 NPRM.

d. Other Evidence on the Consumer Understanding of Risk

The Bureau's Proposal

The 2017 Final Rule pointed to certain other evidence—*i.e.*, evidence other than the Bureau's interpretation of limited data from the Mann study—that it said showed that consumers were not able to accurately predict the specific likelihood of their individual risk of entering a long reborrowing sequence from taking out a covered short-term or longer-term balloon-payment loan. In part V.B.2 of the 2019 NPRM, the Bureau preliminarily found that this other evidence did not suffice to compensate for the insufficient robustness and reliability of the Bureau's prior use of the Mann study in the 2017 Final Rule.

Comments Received

Industry commenters and others stated that the studies, other than the Mann study, cited by the 2017 Final Rule did not address the issue of whether consumers were able to predict their specific risk from payday loans. They further noted that even if some studies were in part suggestive that consumers do not have a complete understanding of their loans, other aspects of the studies indicated that consumers do have a reasonable understanding of the risks associated with their loans.

In addition, these commenters noted that the rate of consumer complaints about payday loans is low relative to other consumer financial products, which indicates that consumers' experience with payday loans is not unexpected. Further, of the payday loan complaints that are submitted, many are about unregulated offshore lenders and illegal operators, and others do not actually relate to payday lenders but are in fact about debt collection or other issues. Finally, these commenters noted, the Bureau has acknowledged that consumer complaints related to payday loans have been declining for the past several years.

Consumer group commenters and others stated that there was a substantial amount of what they considered to be robust and reliable evidence, other than the Mann study, that the 2017 Final Rule pointed to as showing that payday loan consumers do not have a specific understanding of their personal risks from payday loans sufficient to allow them to take reasonable steps to prevent or mitigate the injury from those risks. And, these commenters said, the 2019 NPRM did not address or consider this evidence. Specifically, consumer group commenters asserted, the evidence in the 2017 Final Rule record, which the 2019 NPRM did not address, and which robustly shows consumer lack of understanding, includes the following:

(1) Data showing that substantial numbers of payday loan consumers reborrow repeatedly prior to defaulting on their loans.[200] Consumer group commenters said that this pattern indicates that consumers do not understand their specific risk of defaulting, because, if they had such understanding, they would default earlier in the loan sequences. That is, the consumers could have avoided rollover fees from which they received no benefit if they had defaulted earlier in the loan sequences.

(2) Data showing consumer harm from payday loans and that a large percentage of payday loans are made to consumers who take out the loans repeatedly. Consumer group commenters argued that consumers' recurring use of loans that harm them shows that the consumers cannot reasonably avoid the harm from the loans.[201]

(3) One hundred and fifty studies mentioned by the 2017 Final Rule, of which, commenters said, the 2019 NPRM reconsidered only the Mann study and the Pew study.

---

[200] *See* 82 FR 54472, 54620. *See also id.* at 54572, where the 2017 Final Rule cited to a June 2016 CFPB *Report on Supplemental Findings*, https://www.consumerfinance.gov/data-research/research-reports/supplemental-findings-payday-payday-installment-and-vehicle-title-loans-and-deposit-advance-products/.

[201] Consumer group commenters made this comment in a July 2019 *ex parte* meeting with Bureau staff. The *ex parte* memo prepared by Bureau staff setting forth the comments made during the meeting is available at https://www.regulations.gov/document?D=CFPB-2019-0006-52033.

(4) Additionally, consumer group commenters pointed to other miscellaneous evidentiary sources discussed in the 2017 Final Rule. Specifically, they pointed to: lenders marketing of payday loans as bridges for short-term cash shortfalls, whereas the loans actually function as longer-term, high-cost sources of credit; lenders encouraging consumers to reborrow the full amount of the loan—*i.e.*, to rollover the loan at the end of its term—rather than offering a repayment plan; lenders not evaluating consumers' ability to repay their loans, notwithstanding what commenters describe as consumer expectations that lenders would not permit consumers to take out loans they cannot afford; evidence from the Bureau's supervision, enforcement, and market monitoring activities; consumer complaints submitted to the Bureau's consumer complaints function; the Bureau's stakeholder outreach during the course of its rulemaking that led to the 2017 Final Rule; the 1.4 million public comments submitted in response to the Bureau's 2016 NPRM; the effects of financial distress on consumers' decision-making; and the Bureau's expertise generally.

(5) Finally, consumer group commenters pointed to the Martin study as particularly indicative of consumer lack of understanding.[202] The Martin study reflects the results of interviews with 109 borrowers at New Mexico storefront payday locations. The study found that nearly 60 percent of borrowers who had just exited a payday storefront location after completing their transactions did not know the APR of their loans, while another 16 percent made estimates of their APRs that were incorrect by a substantial margin. Further, nearly a fifth of respondents could not describe the dollar cost of their loans, while nearly 40 percent inaccurately described the dollar cost. Additionally, nearly 80 percent of borrowers in the study did not shop around for

[202] The Martin study was attached to two comments submitted in response to the Bureau's 2016 NPRM, but was not cited by the 2017 Final Rule.

loan terms, and choice of lender was driven more by the convenience of a storefront location than by any other factor; almost no respondents cited the economic terms of the loans as being a factor in their choice of lender.

Additional Evidence Available Subsequent to Publication of the 2019 NPRM

Since publication of the NPRM in February 2019, information about two relevant studies has become available. The first study is a working paper concerning a study of payday lending in Iceland, published in September 2019 (Carvalho study).[203] The study authors use two sources of data to distinguish poor financial conditions from "imperfect decision-making" for consumers. The authors find that 53 percent of the payday loan dollars lent go to consumers in the lowest 20 percent of decision-making ability, which is estimated according to a scale developed by the authors. The study's findings hold in regressions if the authors control for experimental assessments regarding impatience, present bias, risk aversion, financial resources and available demographics. Further, the authors state that low decision-making ability can accurately be characterized as driving payday borrowing mistakes. Finally, the authors suggest that their analysis could likely provide information relevant to U.S. borrowers, offering as support how various characteristics align between their sample and a representative sample of those in the United States. While the authors do not have controls for liquidity for U.S. consumers, after controlling for other characteristics (risk preferences, income, and demographics), their study predicts the same increase in payday loan usage for a given change in decision-making ability.

---

[203] Leandro Carvalho *et al.*, *Misfortune and Mistake: Financial Conditions and Decision-making Ability of High-Cost Loan Borrowers*, NBER Working Paper No. 26328 (Sept. 2019), https://www.nber.org/papers/w26328.

The second study is a working paper publicly released in March 2020 of a study that surveyed borrowers at a lender in Indiana to evaluate their borrowing expectations and attitudes toward restrictions on payday lending (Allcott study).[204] After exiting a payday storefront, 2,122 borrowers were asked survey questions about their expected probability of borrowing another loan within the next eight weeks and, after the application of several pre-registered sample restrictions, 1,205 of these borrowers were used in the analysis. On average, the study participants predicted they had a 70 percent chance of reborrowing, not far from the actual 74 percent reborrowing rate for the sample. On the other hand, borrowers who used payday loans less frequently in the six months prior to the survey were much more likely to underestimate their likelihood of reborrowing.

Most surveyed borrowers said they would "very much" like to give themselves extra motivation to avoid payday loan debt and a supermajority (about 90 percent) would at least somewhat like to give themselves extra motivation. Consistent with this response, borrowers were also willing to pay a large premium for an incentive to avoid reborrowing. Finally, the authors use the survey responses as inputs to a model to estimate borrower awareness of present bias and consumer welfare responses to potential policy interventions. They find borrowers in their sample do put more weight on near-term payoffs, but that borrowers are also aware of this.[205] The authors use simulations to predict the effect of different restrictions on payday lending, finding that consumer welfare decreases under full payday loan bans or under caps on

---

[204] Hunt Allcott *et al.*, *Are High Interest Loans Predatory? Theory and Evidence from Payday Lending*, working paper (Mar. 2020), https://www.dropbox.com/s/ibavoq0pvr8p9ww/Payday.pdf?dl=0.

[205] In an appendix, the study authors allow that a different interpretation of the motivation-related survey parameter is possible. If this alternative interpretation is more accurate, it dramatically increases the weight consumers place on near term payoffs and decreases their awareness of it.

loan sizes, but consumer welfare slightly increases in many scenarios under a three-loan rollover restriction.

Final Rule

The Bureau has considered all of the applicable evidence, including all of the evidence raised by commenters. For the following reasons, the Bureau determines that the evidence does not provide a sufficiently robust and reliable basis to conclude that consumers who use covered short-term or longer-term balloon-payment loans do not have an adequate understanding of their risk of substantial injury from taking out payday loans where lenders have not determined they have the ability to repay them.

Evidence of Repeated Borrowing Prior to Default

The Bureau turns first to the evidence showing that substantial numbers of payday loan consumers reborrow repeatedly prior to defaulting on their loans. This evidence arguably indicates that, with hindsight, the actions that the consumers took turned out not to have been optimal. That is, the consumers could have made themselves better off (than they ended up being) by defaulting earlier in their loan sequences. Nonetheless, the Bureau does not believe that whenever a consumer makes a choice that turns out to have been suboptimal it follows that the consumer lacked understanding of the risk at the time the choice was made. Consumers often make decisions in conditions of uncertainty—uncertainty of which the consumers are aware—and those decisions sometimes turn out to be suboptimal. It does not follow that the consumers at the time of their decisions lacked adequate understanding of their risk of substantial injury from the relevant practice. Moreover, the Bureau has determined that more direct evidence of lack of understanding is necessary in order for the evidence to be robust and reliable.

Evidence of Harmed Consumers Initiating Payday Loan Sequences Recurringly

Regarding the evidence that consumer group commenters asserted shows consumer harm from payday loans and that many initial loans go to consumers who enter into loan sequences repeatedly, the Bureau concludes that that evidence does not in any way suggest that consumers lack adequate understanding of their risk of substantial injury from taking out payday loans if lenders have not determined that they have the ability to repay them. The evidence does not suggest that consumers have inadequate information about, or lack understanding of, or do not have alternatives to, payday loans. Indeed, the Bureau believes the evidence indicates that the consumers, making their own choices, have decided that payday loans are the best option among the alternatives available to them. That is, this evidence does not suggest that consumers lack understanding of any of the options available to them or of the option they have chosen, which is a payday loan.

Other Studies Mentioned by the 2017 Final Rule

In addition, the Bureau has determined that the other studies—*e.g.*, the "150 studies" pointed to by consumer group commenters—mentioned by the 2017 Final Rule are not relevant to the specific issue at hand here. The number of studies is not the point when it comes to the merits of an issue (just like the number of comments on a given issue is not the point). Instead, the Bureau relies on the relevance, rigor, and consistency of findings across studies. The large set of studies discussed in the 2017 Final Rule concerned the experiences of low-income consumers, State reports on payday and vehicle title lending, and responses to changes in State regulations for small dollar lending, all of which provide useful context and evidence on how the market functions and how consumers engage with these products. But these studies do not constitute evidence, let alone robust and reliable evidence, regarding the point at issue here:

whether consumers lack adequate understanding of their risk of substantial injury from taking out payday loans where lenders have not determined they have the ability to repay them.

Other Miscellaneous Sources of Evidence Cited by Commenters

The other miscellaneous evidence pointed to by consumer group commenters—*i.e.*, the evidence summarized under (4) above—does not robustly and reliably indicate that consumers lack specific understanding of their personal risks from payday loans. Some of these sources of information were cited by the 2017 Final Rule for various purposes, but they were not the basis for the 2017 Final Rule's determination that consumers lack the required level of understanding. This is because these sources are even less probative of this issue than the limited data from the Mann study that the Bureau focused on in the 2017 Final Rule and has now determined to be insufficient to support the conclusion in the 2017 Final Rule. As the 2017 Final Rule noted: "Measuring consumers' expectations about re-borrowing is inherently challenging."[206] Contrary to some commenters' suggestions, the Bureau did not have, and does not have, easy access to robust and reliable information on this subject. The miscellaneous sources cited by commenters provide no specific, direct insights into consumers' level of understanding. Commenters instead invite the Bureau to draw indirect inferences from some lenders' behavior; from the Bureau's past activities related to the payday market; from outreach and public comments associated with the Bureau's rulemaking; from consumers' financial situations; and from the Bureau's general expertise. But commenters have not pointed to specific, direct evidence about consumers' understanding that is shown to be scientifically rigorous and representative and therefore robust and reliable.[207]

[206] 82 FR 54472, 54568.

[207] For this reason, these sources are also not sufficiently robust and reliable to supply evidence under the revised standard for reasonable avoidability that the Bureau adopts in part V.B.2.

The Martin Study

The Bureau did not rely on the Martin study in the 2017 Final Rule and does not rely upon it in this rulemaking. The Bureau does not believe that commenters' arguments regarding the Martin study suggest that consumers lack the requisite understanding of their risks from payday loans, for the following reasons.

The Martin study showed that 60 percent of payday loan borrowers did not know the APR of their loans and 52 percent could not provide a reasonable dollar cost of their loans. Even if the Bureau were to grant that this study suggests that some consumers might not know the exact price of their payday loans in APR or dollar terms, the Bureau believes that such lack of knowledge does not indicate that consumers lack adequate understanding of their risk of substantial injury from taking out a payday loan where lenders have not determined that they have the ability to repay them. A consumer can be familiar with payday loans, understand that they are a relatively expensive source of credit,[208] and understand the risks and costs of reborrowing and default, even if the consumer does not know the APR or dollar cost of a payday loan. For example, the consumer might have prior experience using payday loans or might have family, friends, or neighbors who have used payday loans and other forms of credit and from whom the consumer might have developed a reasonable sense of the desirability and risks, and relative expensiveness, of payday loans relative to other forms of credit, even if the consumer does not know the specific APR or dollar cost of the payday loan the consumer received. The

[208] Evidence overall is mixed as to whether consumers understand the price of their loans in dollar-cost terms (*e.g.*, $15 for $100 for 2 weeks), even if they might not remember or understand the loans' APR. For example, a 2009 study by Gregory Elliehausen (Elliehausen study) states that most payday loan consumers say they are aware of the finance charge of their payday loans and report plausible finance charges for their loans. Gregory Elliehausen, *An Analysis of Consumers' Use of Payday Loans*, at 36-37 (Geo. Wash. Sch. of Bus., Monograph No. 41, 2009), https://www.researchgate.net/profile/Gregory_Elliehausen/publication/237554300_AN_ANALYSIS_OF_CONSUMERS'_USE_OF_PAYDAY_LOANS/links/00b7d5362429f9db10000000/AN-ANALYSIS-OF-CONSUMERS-USE-OF-PAYDAY-LOANS.pdf.

Bureau therefore determines that the information from the Martin study about consumer awareness of APRs or dollar costs on payday loans does not indicate that consumers lack understanding of their risk of substantial injury from taking out a payday loan where lenders have not determined they have the ability to repay them.

Evidence Available Subsequent to Publication of the 2019 NPRM

Finally, the Bureau is not relying on the Carvalho study and the Allcott study because they do not show that consumers lack the requisite understanding of their risks of substantial injury from taking out a payday loan where lenders have not determined they have the ability to repay them.

The Carvalho study, as noted above, pertained to Icelandic consumers and found that about half of payday loan dollars go to consumers in the bottom 20 percent of decision-making ability. The primary data from the study concerns Icelandic consumers, which makes its usefulness unclear when considering a regulatory intervention for payday loan borrowers in the United States—absent further research demonstrating that additional key characteristics (such as the liquidity of Icelandic and U.S. borrowers) that could affect their decisionmaking are comparable. In any event, even if Icelandic and United States consumers are comparable in key characteristics, the Bureau concludes that this study does not demonstrate, let alone robustly and reliably demonstrate, that payday loan consumers lack the requisite understanding of their risks of substantial injury from taking out payday loans where lenders have not determined that they have the ability to repay them. While consumers with low decision-making ability could have more difficulty than other consumers in general understanding any credit, financial, or other product, it does not necessarily follow that if these consumers take out payday loans they lack an adequate understanding of their substantial risks of injury from taking out payday loans where lenders have not determined that they have the ability to repay them. The Carvalho study does not show that these consumers do not understand the costs and risks of their payday loan transactions. The consumers in question can be familiar with payday loans and understand that they are a relatively expensive source of credit, even if the consumers generally have low decision-making ability. Moreover, even assuming for the sake of the argument that the subset of payday borrowers in the lowest 20 percent of decision-making ability do not have the requisite understanding of the risks of harm from the practice at issue, roughly one-half of the consumers in the Carvalho study are not in the lowest 20 percent of decision-making ability and so any such conclusion would not be applicable to them. For all of the reasons discussed above, the Carvalho study does not support the conclusions in the 2017 Final Rule that consumers could not reasonably avoid substantial injury from the identified practice.

The Allcott study, as described above, indicates that on average payday borrowers are able to predict their likelihood of reborrowing, but that infrequent borrowers are much more likely to underestimate their likelihood of reborrowing. The Bureau believes that the study does not demonstrate, let alone robustly and reliably demonstrate, that consumers lack the requisite understanding of their risk of substantial injury from taking out payday loans where lenders have not determined that they have the ability to repay them. In the study borrowers were able to predict their probability of reborrowing on average, but the authors did not establish whether the lender determined borrowers' ability to repay their loans and they did not estimate the net costs to consumers of requiring such an assessment. As an additional reason, the study involves a single lender in a single State (Indiana). The Bureau therefore believes that the study is not sufficiently representative to serve as the basis for making findings applicable nationwide about all lenders making payday loans to borrowers in all States. For these reasons, the Bureau is not relying on the Allcott study to support any conclusions in this rulemaking about reasonable avoidability.

For the reasons described above, the Bureau determines that the available evidence does not provide a sufficiently robust and reliable basis to conclude that consumers who use covered short-term or longer-term balloon-payment loans lack an adequate understanding of their risk of substantial injury from taking out payday loans where lenders have not determined that they have the ability to repay them. Accordingly, the Bureau determines to revoke the 2017 Final Rule's findings that any consumer harm from payday loans is not reasonably avoidable and that consumers lack adequate understanding of their risk of substantial injury from taking out payday loans where lenders have not determined that they have the ability to repay them.

C. Countervailing Benefits to Consumers and to Competition

The 2019 NPRM reconsidered whether the identified practice's substantial injury to consumers which is not reasonably avoidable was outweighed by countervailing benefits to consumers or to competition pursuant to section 1031(c)(1)(B) of the Dodd-Frank Act. The Bureau revisited the 2017 Final Rule's determination regarding this element and preliminarily determined that certain countervailing benefits from the identified practice were greater than the Bureau found in the 2017 Final Rule. The Bureau preliminarily revalued the countervailing benefits, proposed to find that they were greater than the Bureau found in the 2017 Final Rule, and proposed to find that the benefits to consumers and competition from the practice outweigh any such injury.

1. Reconsideration of the Dependence of the Unfairness Identification on the Principal Step-Down Exemption

Section 1031(b) of the Dodd-Frank Act authorizes the Bureau to prescribe rules "identifying as unlawful unfair, deceptive, or abusive acts or practices" if the Bureau makes the requisite findings with respect to such acts or practices.[209] The Bureau exercised this authority in § 1041.4 to determine that it is unfair and abusive for a lender to make covered loans "*without reasonably determining that the consumers will have the ability to repay the loans according to their terms*."[210] The Bureau also exercised its authority under section 1031(b) of the Dodd-Frank Act to impose "requirements for the purpose of preventing such acts or practices" by adopting requirements in § 1041.5 for how lenders should go about making such an ability-to-repay determination.[211]

In the section 1022(b)(2) analysis of the 2017 Final Rule, the Bureau estimated that if lenders ceased to engage in the identified practice and instead followed the mandatory underwriting requirements designed to prevent that practice, only one-third of current borrowers would be able to obtain any loans and, of those who obtained a loan, only one-third would be able to obtain a subsequent loan.[212] The end result, the Bureau estimated, would be to eliminate between 89 and 93 percent of all loans.[213]

In conducting its countervailing benefits analysis, the 2019 NPRM stated that the Bureau in the 2017 Final Rule did not address the benefits to consumers or competition from lenders

---

[209] 12 U.S.C. 5531(b).

[210] 12 CFR 1041.4 (emphasis added).

[211] 12 U.S.C. 5531(b); 12 CFR 1041.5.

[212] 82 FR 54472, 54833.

[213] *Id.* at 54826 (storefront payday), 54834 (vehicle title).

making covered short-term and longer-term balloon-payment loans without an ability-to-repay determination. Rather than focusing on the effects of the identified practice itself, the 2019 NPRM stated that the Bureau interjected into its analysis the effect of Rule provisions that were intended to mitigate the general effects of the requirement that lenders make an ability-to-repay determination.

Specifically, the Bureau included in its countervailing benefits analysis the principal step-down exemption in § 1041.6. The principal step-down exemption permits a certain number of covered short-term and longer-term balloon-payment loans to be made without assessing the consumer's ability to repay so long as the loans meet a series of other conditions, including a requirement that the loan amount is amortized over successive loans by stepping down the principal over such loans. None of these conditions involve any ability-to-repay determination by the lender. Rather, the conditions generally focus on whether the loan amount is amortized (stepped down) over successive loans. The Bureau predicted that the novel principal step-down exemption would actually be the predominant approach that payday lenders would use to comply with the Mandatory Underwriting Provisions, because of the substantial burdens the Mandatory Underwriting Provisions would impose on lenders.

The principal step-down exemption was not part of the identified practice. Rather, the exemption was added pursuant to the Bureau's authority to create exemptions which the Bureau deems "necessary or appropriate to carry out the purposes and objectives of" title X of the Dodd-Frank Act.[214]

The 2019 NPRM proposed to find that the Bureau in the 2017 Final Rule did not consider in the countervailing benefits analysis the full benefits to consumers and competition from the

[214] 12 U.S.C. 5512(b)(3).

identified practice of lenders making covered loans without making an ability-to-repay determination. As the 2017 Final Rule stated, the combination of the mandatory underwriting requirements plus the principal step-down exemption meant that only a "relatively limited number of consumers" would face a "restriction on covered loans" which "decreases the cost of the remedy, which in turn reduces the weight on the countervailing benefits side of the scale."[215] This weight would have been much greater had the Bureau properly considered the full benefits from lenders engaging in the identified practice.

The 2019 NPRM observed that the approach taken by the Bureau in the 2017 Final Rule puts the proverbial cart before the horse. A predicate for the exemption is the existence of an act or practice which is unfair—which is to say, the existence of an act or practice for which the substantial injury that consumers cannot reasonably avoid outweighs countervailing benefits to consumers or to competition. According to the 2019 NPRM, it follows that an exemption predicated on the existence of an unfair practice should not be taken into account in determining whether a particular act or practice is unfair (*i.e.*, in assessing the countervailing benefits of the act or practice at issue).

As the FTC Unfairness Policy Statement explains, "[m]ost business practices entail a mixture of economic and other costs and benefits for purchasers. . . . The [FTC] is aware of these tradeoffs and will not find that a practice unfairly injures consumers unless it is injurious in its net effects."[216] In the 2017 Final Rule, the Bureau declared a practice unfair based on its net aggregate costs to consumers, but in doing so it relied analytically on a large-scale exemption to avoid fully considering the practice's benefits, thereby discounting the benefits of the practice

[215] 82 FR 54472, 54609, 54603.

[216] *See* FTC Unfairness Policy Statement, *Int'l Harvester*, 104 F.T.C. at 1074.

relative to its costs. Because the 2017 Final Rule did not confront the total tradeoffs between the benefits and costs of the identified practice, the 2019 NPRM preliminarily determined that the 2017 Final Rule undervalued countervailing benefits. Doing so may result in business practices being treated as unfair even though they in fact are beneficial on net to consumers or competition.

Accordingly, the Bureau preliminarily determined that when evaluating the countervailing benefits of the identified practice, the Bureau should have accounted for the complete benefits from that practice. The complete benefits to consumers and competition should reflect the benefits that would be lost if the identified practice were prohibited. Otherwise, it is not possible to accurately assess (as the Bureau now preliminarily interprets the unfairness test as requiring) whether the benefits of making such loans without determining ability to repay outweigh the injury from doing so.

Comments Received

Twelve State attorneys general commented that the 2017 Final Rule improperly considered the principal step-down exemption. According to this comment, this led the Bureau to artificially reduce the costs of the Mandatory Underwriting Provisions and incorrectly determine that countervailing benefits did not offset substantial injury.

Other commenters stated that it was appropriate to consider the principal step-down exemption in the countervailing benefits analysis. Commenters stated that the principal step-down exemption was part of the remedy and consideration of the remedy in a countervailing benefits analysis is appropriate. In support of this proposition, commenters cited the FTC Unfairness Policy Statement, which provides that an agency must "take account of the various costs that a remedy would entail," which includes compliance costs and costs to society more broadly.[217] At least one commenter cited examples of remedies being considered in other unfairness rules, including the FTC's Credit Practices Rule and the FRB's Credit Cards Rule.[218] The commenter stated that these rules provide examples of agencies assessing the real-world benefits and costs and demonstrate that the countervailing benefits analysis should not assess the prohibition they design in isolation.

A commenter stated that to exclude the remedy is irrational because the unfair practice could be reframed to incorporate the remedy. The commenter stated that the Bureau could have defined the unfair practice to incorporate the principal step-down exemption in the following manner: the practice of making covered loans without making a reasonable determination that a borrower will have the ability to repay the loans according their terms or without providing a means to pay off the loans in a reasonable number of installments when it becomes evident that a borrower cannot repay the loans according to their terms.

Some commenters asserted that the countervailing benefits determination did not depend on the principal step-down exemption. At least one commenter noted that the 2017 Final Rule concluded that the countervailing assessment based on the 2016 NPRM—which the commenter suggested (erroneously) did not propose a principal step-down exemption—was correct. This commenter states that the Bureau implemented the principal step-down exemption to not overly restrict access to credit—not because the principal step-down exemption was essential to the countervailing benefits analysis.[219] Further, the commenter asserted that the 2017 Final Rule could not have taken the principal step-down exemption into account for vehicle title loans, for which no conditional exemption is available.

---

[217] *Int'l Harvester*, 104 F.T.C. at 1073.

[218] *See* 49 FR 7740, 7766, 7759; 74 FR 5498, 5515, 5524.

[219] *See* 82 FR 54472, 54603.

Final Rule

After reviewing the comments received, the Bureau concludes that it should not have relied upon the principal step-down exemption when evaluating the countervailing benefits of the identified practice.

As an initial matter, the Bureau concludes that remedies are a proper consideration in the countervailing benefits analysis. As the FTC Unfairness Policy Statement states, it is proper to take "account of the various costs that a remedy would entail."[220] However, the principal step-down exemption simply does not represent a remedy for the identified unfair practice of making covered loans "without reasonably determining that the consumers will have the ability to repay the loans according to their terms."[221] The principal step-down exemption establishes approximately sixteen conditions devised by the Bureau, *none* of which call upon the lender to make any determination of the consumer's ability to repay.[222] And as the 2019 NPRM noted, the 2017 Final Rule anticipated that the principal step-down exemption would be the predominant approach that payday lenders would use to comply. In other words, the principal step-down exemption was expected to create a situation in which most lenders engage in the identified unfair practice, that is, making payday loans to consumers where lenders have not determined they have the ability to repay them. Certainly, the conditions imposed by the principal step-down exemption created a financial product that the Bureau considered to be more desirable than a product without those conditions, but only by permitting most lenders to continue to engage in the purportedly unfair practice of making payday loans to consumers where lenders have not

[220] *Int'l Harvester*, 104 F.T.C. at 1073.

[221] 12 CFR 1041.4.

[222] 12 CFR 1041.6; *see also* 12 CFR part 1041, supp. I, section 1041.6.

determined that they have the ability to repay them. The logical remedy to consider when evaluating whether not making a reasonable ability-to-repay determination is unfair is the remedy of requiring lenders to make a reasonable ability-to-repay determination.[223]

The FTC precedents cited by some commenters are not inconsistent with this conclusion. For example, the FTC Credit Practices Rule prohibited wage assignments in consumer contracts with some exceptions, such as revocable wage assignments, that were deemed "noninjurious."[224] The FTC Credit Practices Rule also prohibited non-purchase money security interests in household goods, but allowed purchase money loans and security interests in valuable possessions because, unlike blanket security interests, they were necessary to preserve the commercial viability of lenders.[225] The FTC Credit Practices Rule simply provides an example of an agency defining the appropriate scope of an unfair practice, which is not comparable to the 2017 Final Rule's use of the principal step-down exemption. For instance, the FTC Credit Practices Rule did not declare that purchase money loans and security interests in valuable possessions were within the unfair practice, then exempt them if they satisfied various conditions specified by the agency, and then disregard their countervailing benefits in evaluating the overall countervailing benefits of the unfair practice. Instead, the FTC Credit Practices Rule excluded certain transactions from the scope of the unfair practice, and it did not attempt to rely upon them in conducting the countervailing benefits analysis that was necessary to establish an unfair practice. Revocable wage assignments were allowed because they were non-injurious. Security

[223] The agency's chosen remedy can, of course, include additional preventative requirements so long as those have a "reasonable relation" to the identified unfair practice. 82 FR 54472, 54519 (citing *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 988 (D.C. Cir. 1985)).

[224] 49 FR 7740, 7760-61.

[225] *Id.* at 7766.

interests in valuable possessions were deemed to pose limited consumer risk but provided significant benefit to competition.

Another rule cited by commenters, the Federal Reserve's Credit Card Rule, identified applying excess payments to different balances on a consumer credit card "in a manner that does not apply a significant portion of the amount to the balance with the highest annual percentage rate" as an unfair practice under the FTC Act.[226] When assessing countervailing benefits, the Federal Reserve recognized that the rule would reduce lender revenue and potentially increase interest rates on all loans. But the Federal Reserve determined that these costs would be muted because lenders could choose between two specified methodologies for applying excess payments.[227] These permitted methodologies (*i.e.*, specific methods about how to apply excess payments) were both effective in remedying the identified unfair practice (*i.e.*, not applying a significant amount of an excess payment to the balance with the highest APR).

A commenter argued that the Bureau should reframe the identified unfair practice to incorporate the principal step-down exemption. This commenter argued that the Bureau should add the following words to the identified unfair practice: "or without providing a means to pay off the loans in a reasonable number of installments when it becomes evident that a borrower cannot repay the loans according to their terms." In the commenter's view, this would provide a basis for the principal step-down exemption as a remedy for the modified unfair practice. But if the identified practice were redefined, then the Bureau would have to reassess each of the elements of unfairness for that identified practice, not just reassess countervailing benefits. The approach proposed by the commenter would do nothing to address the Bureau's separate

[226] 74 FR 5498, 5514.

[227] *Id.* at 5515. Among other prohibitions, the Rule also found it unfair for lenders to increase APR applicable to an outstanding balance on consumer credit card, except in certain prescribed circumstances. *See id.* at 5521.

conclusions regarding the reasonable avoidability element of unfairness in part V.B. Such a fundamental change would entail an additional complex rulemaking, which as the Bureau explains in part VII on consideration of alternatives is not consistent with the Bureau's rulemaking priorities. Moreover, even if the Bureau was to modify the unfair practice in the manner suggested by the commenter, the principal step-down exemption includes various conditions that are unrelated to remedying such a modified unfair practice, such as the principal limit of $500.

Some commenters pointed to statements in the 2017 Final Rule that they claim indicate that the Bureau did not rely upon the principal step-down exemption in its countervailing benefits analysis. As background, in the 2016 NPRM, the Bureau had not proposed to include the principal step-down exemption in its countervailing benefits analysis.[228] The 2017 Final Rule does contain a statement that the 2016 NPRM's preliminary determination that countervailing benefits element was satisfied "was correct,"[229] and it contains some other positive language about the 2016 NPRM's proposed countervailing benefits analysis.[230] But these summary statements do not mean that the 2017 Final Rule was based upon and relied upon everything in the 2016 NPRM's proposed analysis, as commenters suggest.

And in fact, in both its description of its countervailing benefits analysis and in the substance of that analysis, the 2017 Final Rule relied upon the principal step-down exemption. The Bureau referred to the principal step-down exemption's impact on credit access several

[228] *See* 81 FR 47863, 47939 n.540.

[229] 82 FR 54472, 54603.

[230] *Id.* (suggesting that certain improvements at the final rule stage resulted in the "injury from the identified practice outweighing the countervailing benefits to consumers by even more than it did at the proposal stage").

times in the preamble to § 1041.4.[231] In particular, in assessing the countervailing benefits to a particular group of covered loan users—reborrowers—the Bureau explicitly invoked the principal step-down exemption's mitigating effect.[232] Further, when considering the 2017 Final Rule's major impacts in the section 1022(b)(2) analysis, the Bureau cited a simulation that accounted for the principal step-down exemption.[233] Thus, the countervailing benefits analysis did rely upon the conditional exemption.

Finally, the Bureau does not agree with the comment suggesting that the fact that vehicle title loans cannot qualify for the principal step-down exemption but are included in the definition of covered loan indicates that the exemption did not affect the countervailing benefits analysis; borrowers' and lenders' activities across the covered loan markets were incorporated into the Bureau's analysis. As both the 2017 Final Rule and the 2019 NPRM noted, the relevant injuries and countervailing benefits of the identified unfair practice are considered in the *aggregate*.[234]

The Bureau now determines that, by relying upon the principal step-down exemption in its countervailing benefits analysis, the 2017 Final Rule failed to acknowledge the full measure of the Mandatory Underwriting Provisions' costs to consumers and competition. Based on the 2017 Final Rule's simulations, these unacknowledged costs may have dramatic effects.[235] Accordingly, the Bureau concludes that the 2017 Final Rule should not have relied on the

---

[231] *See, e.g.*, *id.* at 54603, 54604, 54606.

[232] *Id.* at 54606 ("The Bureau concludes that this aggregate injury to many 'reborrowers' outweighs the countervailing access-to-credit benefits that other 're-borrowers' may receive as a result of lenders not reasonably assessing the borrower's ability to repay the loan according to its terms, in light of all the provisions of the final rule, *including the effect that § 1041.6 will have in reducing the magnitude of those benefits*.") (emphasis added).

[233] *Id.* at 54817.

[234] *Id.* at 54602, 54591.

[235] In the 2017 Final Rule, when assuming the existence of the conditional exemption, the Bureau estimated that the Mandatory Underwriting Provisions would decrease total covered loan volume by 71 to 76 percent. But without the conditional exemption, the Bureau estimated a reduction of loan volume of approximately 92 to 93 percent. *Id.* at 54826.

principal step-down exemption in its assessment of countervailing benefits to consumers and competition, and therefore the 2017 Final Rule undervalued the identified practice's benefits to consumers and competition.

2. Effect of Undervaluing Countervailing Benefits

In the 2019 NPRM the Bureau preliminarily determined that after fully accounting for the countervailing benefits—including benefits it disregarded in the 2017 Final Rule because of its reliance on the principal step-down exemption and also other benefits that the 2017 Final Rule undervalued—that the substantial injury from the identified practice that consumers cannot reasonably avoid is outweighed by the aggregate countervailing benefits to consumers and competition of that practice.

As the 2017 Final Rule noted and the 2019 NPRM reiterated, the relevant question under section 1031(c)(1)(B) of the Dodd-Frank Act is whether the countervailing benefits "outweigh the substantial injury *that consumers are unable reasonably to avoid* and that stems from the identified practice."[236] For purposes of the countervailing benefits analysis, the 2019 NPRM accepted the 2017 Final Rule's conclusion that there is injury that is not reasonably avoidable (although elsewhere the 2019 NPRM proposed to withdraw that conclusion regarding reasonable avoidability, and this rule withdraws that conclusion for the reasons described in part V.B). The 2019 NPRM noted that the 2017 Final Rule approached the countervailing benefits analysis by first weighing the relevant injury in the aggregate, then weighing countervailing benefits in the aggregate, and then assessing which of the two predominates.[237] As both the 2017 Final Rule and the 2019 NPRM explained, the substantial, not-reasonably-avoidable injury "is weighed in

---

[236] 82 FR 54472, 54602 (emphasis added).

[237] *Id.*

the aggregate, rather than simply on a consumer-by-consumer basis," and conversely "the countervailing benefits to consumers are also measured in the aggregate, and the Bureau includes the benefits even to those consumers who, on net, were injured."[238]

a. Countervailing Benefits to Consumers

The Bureau's Proposal

In the 2017 Final Rule and the 2019 NPRM, the Bureau analyzed the countervailing benefits separately for three segments of consumers, defined by their *ex post* behavior: repayers (those who repay a covered short-term or longer-term balloon-payment loan when due without the need to reborrow within 30 days); reborrowers (those who eventually repay the loan but after one or more instances of reborrowing); and defaulters (those who default either on an initial loan or on a subsequent loan that is part of a sequence of loans).[239] In the 2019 NPRM, the Bureau requested comment on whether these were the appropriate categories to use to analyze the existence of countervailing benefits.

Repayers. In between 22 percent and 30 percent of payday loan sequences[240] and a smaller slice of vehicle title sequences,[241] borrowers obtain a single loan, repay it in full when first due, and do not reborrow again for a period of 14 to 30 days thereafter. In conducting the countervailing benefits analysis in the 2017 Final Rule with respect to repayers, the Bureau did

---

[238] *Id.* at 54591.

[239] *Id.* at 54599-600.

[240] *See* Supplemental Findings at 120. The higher number uses a 14-day definition of loan sequence and thus includes consumers who repay their first loan and do not borrow within the ensuing two weeks. The lower number uses a 30-day definition and thus counts only those who do not reborrow within 30 days after repayment.

[241] *See* Bureau of Consumer Fin. Prot., *Single-Payment Vehicle Title Lending*, at 11 (May 2016), https://files.consumerfinance.gov/f/documents/201605_cfpb_single-payment-vehicle-title-lending.pdf (11 to 13 percent).

not suggest that the identified practice was without benefit to these repayers. Rather, the Bureau's countervailing benefits analysis in the 2017 Final Rule effectively acknowledged the identified practice had benefits for some repayers because the Rule recognized that it was important to avoid "false negatives," *i.e.*, consumers who in fact have the ability to repay but who could not establish it *ex ante*.[242] However, the Bureau determined that these countervailing benefits were "minimal," in part because the Bureau anticipated that lenders would make substantially all the loans permitted by the Mandatory Underwriting Provisions of the 2017 Final Rule and in part because the Bureau believed that the principal step-down exemption would mitigate any false negative concerns.[243]

In the 2019 NPRM, the Bureau preliminarily determined that in the 2017 Final Rule it understated the risk that, under the mandatory underwriting requirements, some consumers who would be repayers and would benefit from receiving a loan would nonetheless be denied a loan. According to the 2019 NPRM, this risk arises in part from the difficulty some borrowers may have in proving their ability to repay and in part from the fact that some lenders may choose to "over-comply" in order to reduce their legal exposure. Although the 2017 Final Rule minimized the possibility that lenders would take a "conservative approach . . . due to concerns about compliance risk,"[244] the Bureau preliminarily concluded in the 2019 NPRM that somewhat greater weight should be placed on this risk. In reaching this preliminary determination, the Bureau cited its experience in other markets which indicates that some lenders generally seek to take steps to avoid pressing the limits of the law.

[242] *See* 82 FR 54472, 54603-04.

[243] *Id.*

[244] *Id.* at 54603.

Moreover, from the perspective of the repayers, the 2019 NPRM stated there may also be significant effects of requiring lenders to make ability-to-repay determinations that might be termed "system" effects. As previously noted, the 2017 Final Rule's assessment of benefits and costs estimated that, if covered short-term or longer-term balloon-payment loans could be made only to those consumers with an ability to repay in a single installment without reborrowing, lenders would not make upwards of 90 percent of all loans and of course not receive revenue from loans that are not made. At a minimum, the 2019 NPRM stated that would lead to a vast constriction of supply. The Bureau in the 2019 NPRM preliminarily determined that a 90 percent reduction in revenue would produce at least a corresponding reduction in supply[245] and could have even a more profound effect if the remaining revenue were insufficient for lenders to remain in operation using their current business model. In other words, the Bureau preliminarily believed that one of the countervailing benefits of permitting lenders to engage in the identified practice is that it makes it possible to offer loans on a wide-scale basis to the repayers. According to the 2019 NPRM, prohibiting such lending will necessarily decrease the ability of the repayers to obtain covered short-term and longer-term balloon-payment loans.

Reborrowers. As the Bureau noted in the 2017 Final Rule, over 55 percent of both payday and vehicle title sequences result in the consumer reborrowing one or more times before finally repaying and not borrowing again for 30 days.[246] The Bureau acknowledged that some of these borrowers who are unable to repay in a single installment (*i.e.*, without reborrowing) may nonetheless benefit from having access to covered short-term and longer-term balloon-payment

---

[245] *See id.* at 54817, 54842 (estimating that the 2017 Final Rule as a whole, including the principal step-down exemption, would reduce loan volume by between 62 and 68 percent and would result in a corresponding reduction in the number of retail outlets).

[246] *Id.* at 54605.

loans because the borrowers may be income-smoothing across a longer time span. These borrowers also may benefit because they may face eviction, overdue utility bills, or other types of expenses, with paying such expenses sometimes creating benefits for consumers that outweigh the costs associated with the payday loan sequence. But the Bureau in the 2017 Final Rule stated that the principal step-down exemption—which it said is "worth emphasizing" in this context—would "reduc[e] the magnitude" of the countervailing benefits flowing from the identified practice.[247] After taking into account this reduction, the Bureau in the 2017 Final Rule concluded, however, that the remaining countervailing benefits were outweighed by the injury to those reborrowers who find themselves "unexpectedly trapped in extended loan sequences."[248]

The 2019 NPRM stated that, on its own terms, this reasoning has no applicability with respect to vehicle title reborrowers for whom the principal step-down exemption would not be available and who thus would lose the ability to income smooth over more than one vehicle title loan or deal with the expenses referenced above. According to the 2019 NPRM, this reasoning similarly does not apply to payday loan reborrowers who cannot qualify for the principal step-down exemption, for example, borrowers who find that they have a new need for funds but have already exhausted the various borrowing limits imposed by the exemption.[249] Moreover, the Bureau preliminarily determined that this reliance on the principal step-down exemption was inappropriately considered.

The Bureau in the 2019 NPRM preliminarily believed that the consequences of this reliance on the exemption are profound. Under an ability-to-repay regime, assuming the systemic effects did not eliminate the industry completely, the 2019 NPRM stated that most of

---

[247] *Id.* at 54606.

[248] *Id.* at 54605.

[249] 12 CFR 1041.6.

the 58 percent of payday borrowers or 55 percent of vehicle title borrowers would lose access to covered short-term and longer-term balloon-payment loans because reborrowers lack the ability to repay the loans according to their terms. To the extent some consumers passed an ability-to-repay assessment and needed to reborrow, the 2019 NPRM stated that most would be precluded from taking out a second loan. In other words, the practice of making covered short-term or longer-term balloon-payment loans to consumers who cannot satisfy the mandatory underwriting requirement is the linchpin of enabling the reborrowers to access these types of loans.

The Bureau acknowledged in the 2019 NPRM that among reborrowers there is a sizable segment of consumers who end up in extended loan sequences before repaying and thus incur significant costs. But even for these borrowers, there is some countervailing benefit in being able to obtain access to credit, typically through the initial loan, that is used to meet what the Bureau acknowledged in the 2017 Final Rule to be an "urgent need for funds"[250]—for example, to pay rent and stave off an eviction or a utility bill and avoid a shutdown, or to pay for needed medical care or food for their family.[251] Moreover, over 35 percent of the reborrowers required only between one and three additional loans before being able to repay and stop borrowing for 30 days and an additional almost 20 percent of the reborrowers required between four and six additional loans before being able to repay.[252] The 2019 NPRM stated that these shorter-term reborrowers would forgo any benefits associated with these additional loans if lending was limited to those who can demonstrate an ability to repay in a single installment.

---

[250] 82 FR 54472, 54620.

[251] As discussed in the Rule, *id.* at 54538, surveys which ask borrowers about the reasons for borrowing may elicit answers regarding the immediate use to which the loan proceeds are put or about a past expense shock that caused the need to borrow, making interpretation of the survey results difficult. But what seems beyond dispute is that these borrowers have a pressing need for additional money.

[252] *See* Supplemental Findings at 122 (fig. 36).

In sum, the Bureau preliminarily believed that there are substantial countervailing benefits for reborrowers that flow from the identified practice that the Bureau preliminarily determined should not have been discounted in the 2017 Final Rule by relying on the principal step-down exemption.

Defaulters. The third group of borrowers discussed in the 2017 Final Rule were those whose sequences end in default. As to this group, representing 20 percent of payday borrowers[253] and 32 percent of vehicle title borrowers,[254] the Bureau in the 2017 Final Rule acknowledged that "these borrowers typically would not be able to obtain loans under the terms of the final rule" (and thus the Bureau did not rely on the principal step-down exemption in assessing the effects on these consumers).[255] The Bureau went on to note that "losing access to non-underwritten credit may have consequences for some consumers, including the ability to pay for other needs or obligations" and the Bureau stated that this is "not an insignificant countervailing benefit."[256] But the Bureau went on to state that these borrowers "are merely substituting a payday lender or title lender for a preexisting creditor" and obtaining "a temporary reprieve."[257]

According to the 2019 NPRM, it is not necessarily true that all defaulters use their loan proceeds to pay off other outstanding loans; at least some use the money to purchase needed goods or services, such as medical care or food. Moreover, the Bureau expressed concern that in the 2017 Final Rule it minimized the value to consumers of substituting a payday lender for other

---

[253] *See id.* at 120 (tbl. 23).

[254] *See* Bureau of Consumer Fin. Prot., *Single-Payment Vehicle Title Lending*, at 11 (May 2016), *https://files.consumerfinance.gov/f/documents/201605_cfpb_single-payment-vehicle-title-lending.pdf*.

[255] 82 FR 54472, 54604.

[256] *Id.*

[257] *Id.* at 54604, 54590.

creditors, such as a creditor with the power to initiate an eviction or shut off utility services or refuse medical care. The Bureau also expressed concern that the 2017 Final Rule minimized the value of a "temporary reprieve" which may enable defaulters to stave off more dire consequences than the consequences of defaulting on a payday loan.

Conclusion. In sum, the Bureau preliminarily concluded that the 2017 Final Rule's approach to its countervailing benefits analysis caused it to underestimate the countervailing benefits to consumers in terms of access to credit that flows from the identified practice. According to the 2019 NPRM, it is not just the benefit of access to credit for those payday loan consumers who would lose access under the principal step-down exemption that should be weighed; rather the systemic effects of ending the identified practice and eliminating over 90 percent of all payday and vehicle title loans would adversely affect the interests of all borrowers—including even those with the ability to repay. Furthermore, the Bureau preliminarily believed that it underestimated the benefits of access to credit for a large segment of reborrowers and even for some defaulters—including the benefits of a temporary reprieve, of substituting a payday or vehicle title lender for some other creditor and, for the reborrowers, the benefit of smoothing income over a period longer than a single two-week or 30-day loan. The Bureau preliminarily determined that after giving appropriate weight to the interests of all affected consumers, the countervailing benefits to consumers that flow from the practice of making covered short-term and longer-term balloon-payment loans without making an ability-to-repay determination outweigh the substantial injury that the Bureau considered in the 2017 Final Rule to not be reasonably avoidable by consumers. The Bureau invited comment on these preliminary conclusions.

Comments Received

Industry, trade association, tribal, and other commenters largely agreed that the 2017 Final Rule undervalued benefits to consumers. Commenters stated that the 2017 Final Rule will limit access to short-term credit, particularly for financially distressed consumers who lack access to traditional forms of credit, including credit from depository institutions. A commenter noted that lenders will not be able to obtain information for underwriting for "unscorable" consumers without credit files.

These commenters stated that the 2017 Final Rule would cause consumers to resort to unregulated or more expensive credit alternatives, including overdraft protection or pawnbrokers. Commenters stated that consumers may suffer financial harms, including overdrawing accounts, bouncing checks, missing payments, accruing late fees, or defaulting. Commenters cited studies of Georgia, North Carolina, and New York as evidence that consumers suffer adverse consequences where payday loans are restricted.[258]

These commenters also responded to the 2019 NPRM's preliminary reassessment of the 2017 Final Rule's effects on specific groups of consumers, including reborrowers and defaulters.[259] These commenters agreed that the 2017 Final Rule underestimated the benefit of covered loans to reborrowers, including hourly or gig economy workers with fluctuating incomes, who benefit from income smoothing and the ability to access credit in an emergency.

---

[258] *See* Donald P. Morgan & Michael R. Strain, *How Payday Credit Access Affects Overdrafts and Other Outcomes*, 44 J. Money Credit & Banking 519, 521 (2012), and *Payday Holiday: How Households Fare after Payday Credit Bans* (Feb. 2008), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr309.pdf (borrowers were more likely to experience an adverse change after a decrease in the number of payday lenders in Oregon); Piotr Danisewicz & Ilaf Elard, *The Real Effects of Financial Technology: Marketplace Lending and Personal Bankruptcy* (July 2018), https://www.ssrn.com/abstract=3208908 (the reduction in marketplace credit following *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015), led to an 8 percent increase in personal bankruptcies in New York and Connecticut).

[259] *See* 84 FR 4252, 4272-74.

These commenters agreed that the 2017 Final Rule minimized the value of the temporary reprieve to defaulters.

Other commenters stated that the 2019 NPRM appropriately emphasizes consumer sentiment and a balanced consideration of consumer sentiment measures, including complaints, which suggests that payday loans benefit consumers.

By contrast, some consumer groups and other commenters characterized covered loans as dangerous financial products that provide no productive economic value and trap vulnerable consumers in cycles of debt. These commenters stated that covered lenders do not provide access to productive credit that helps bridge a short-term financial shortfall—they flip borrowers from one unaffordable loan to another for as long as possible. Some other commenters similarly stated that payday loan use is often driven by insufficient income to cover expenses and that small-dollar loans do not fix this underlying problem—they exacerbate it by becoming an additional liability.

Other commenters stated that the 2019 NPRM mischaracterized the 2017 Final Rule's findings with respect to the Mandatory Underwriting Provisions' impact on access to credit. They claimed that the 2019 NPRM paraphrased the 2017 Final Rule's calculations of reduced covered loan volume and lender revenue to imply a commensurate reduction in access to credit, but the 2017 Final Rule did not reach this conclusion.

Some commenters stated that the 2017 Final Rule would preserve appropriate access to covered loans. With respect to the specific covered loan consumers (*i.e.*, repayers, reborrowers, and defaulters) that the 2019 NPRM identified, at least one commenter stated that repayers would maintain access to covered loans. Another commenter stated that short-term reborrowers could continue to take out one or two loans to address a temporary financial hardship under the

2017 Final Rule. At least one commenter stated that the inability to access covered loans would be concentrated among consumers who lack the ability to repay and are most likely to be injured by covered loans.

Some commenters stated that the 2017 Final Rule would not prevent consumers from accessing credit and non-credit alternatives to covered loans. These commenters stated that the experience of consumers in States with payday loan restrictions evidence this fact. Some commenters stated that the 2019 NPRM failed to take into account that covered lenders can shift to installment or longer-term loans, which was the experience in some States after payday lending restrictions were adopted, including Colorado, Illinois, New Mexico, Ohio, Texas, Virginia, and Wisconsin.[260] For example, a commenter noted that a prominent payday lender recently disclosed that only 19 percent of its revenue came from multi-payment loans in 2010, but by the third quarter of 2018, that figure had quadrupled to 77 percent.[261] Another commenter stated that in at least 26 of the 32 States where payday and vehicle title lenders operate today, non-bank small-dollar lenders can already offer loans with terms beyond 45 days.[262]

A commenter faulted the 2019 NPRM for attempting to compare the number of consumers in specific groups who are benefitted and harmed by covered loans—*i.e.*, repayers, reborrowers, and defaulters—without considering the magnitude of harm across those groups. According to this commenter, even if the number of consumers that receive some benefit from

---

[260] These comments tend to support the conclusion that consumers can turn to alternative products to avoid injury from taking out a covered loan.

[261] *See* CURO Group, *Presentation at Jefferies Consumer Finance Summit*, at 9 (Dec. 2018), *https://ir.curo.com/events-and-presentations*.

[262] *See* Pew Charitable Trusts, *From Payday to Small Installment Loans: Risks, opportunities, and Policy Proposals for Successful Markets* (Aug. 2016), *https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/08/from-payday-to-small-installment-loans*.

covered loans exceeds the number of harmed consumers, the product may not produce a countervailing benefit if the harm experienced by consumers is sufficiently severe.

Some commenters stated that the 2019 NPRM did not introduce new evidence in support of the proposed reassessment of countervailing benefits to consumers. These commenters stated that the 2019 NPRM fails to provide any data to dispute the 2017 Final Rule's findings and instead speculates about alternative scenarios and differences in weights to hypothetical benefits. A commenter argued that the 2019 NPRM's approach to countervailing benefits is inconsistent with the proposal's emphasis on robust and reliable evidence in other contexts in within the 2019 NPRM.

Final Rule

After reviewing the comments, the Bureau concludes that the 2017 Final Rule underestimated the identified practice's countervailing benefits to consumers in terms of access to credit that flows from the identified practice.

At the outset, the Bureau reemphasizes one point made by the 2017 Final Rule regarding how evidence is considered in a countervailing benefits analysis. Consistent with the approach to unfairness under the FTC Act, the Bureau does not "quantify the detrimental and beneficial effects of the practice in every case. In many instances, such a numerical benefit-cost analysis would be unnecessary; in other cases, it may be impossible."[263] The Bureau does "carefully evaluate the benefits and costs of each exercise of its unfairness authority, gathering and considering reasonably available evidence."[264] But as case law regarding FTC unfairness rules has recognized, "much of a cost-benefit analysis requires predictions and speculation."[265] The

[263] S. Rep. No. 103-130, at 13 (1994) (quoted at 82 FR 54472, 54521 n.386).

[264] *Id.*

[265] *Pa. Funeral Dirs. Ass'n v. FTC*, 41 F.3d 81, 91 (3d Cir. 1994) (quoted at 82 FR 54472, 54521 n.386).

2017 Final Rule's countervailing benefits analysis was indeed limited and qualitative in some respects, which compelled the Bureau in the 2017 Final Rule to make some predictions and speculations. Limitations in evidence may require prediction or speculation. Such prediction or speculation is a matter of degree based on the evidence available. The Bureau's reconsideration is based on the same record as the 2017 Final Rule.

The Bureau is not persuaded by commenters that the approach to evidence in the context of reasonable avoidability is inconsistent with the approach to evidence in the context of countervailing benefits. As explained in part V.B.2, the Bureau has decided to require robust and reliable evidence in order to conclude that consumers cannot reasonably avoid injury, in light of the dramatic impacts of the Mandatory Underwriting Provisions on the payday market and in turn consumer choice. But for purposes of this countervailing benefits analysis, the Bureau assumes that the relevant group of longer-term borrowers cannot reasonably avoid injury, and so those concerns about consumer choice are not determinative of the quality and quantity of evidence that is appropriate when weighing countervailing benefits. Instead, the Bureau must decide whether the relevant detrimental effects or beneficial effects of the identified practice predominate, including those effects that are significant without being quantifiable.

Turning to the substance of the countervailing benefits analysis, the Bureau notes that commenters disagreed on whether the 2017 Final Rule would result in reduced access to credit. Industry and consumer groups largely divided along this question. After considering the evidence cited in the 2019 NPRM and information submitted in comments to the proposal, the Bureau concludes that the 2017 Final Rule would dramatically reduce access to covered loans to the detriment of consumers. As the 2017 Final Rule explained, a Bureau simulation that excluded the principal step-down exemption estimated that the ability-to-repay requirement would reduce storefront and online payday loan volume and lender revenue by 92 to 93 percent.[266] The simulation also estimated that restrictions on short-term vehicle title lending will reduce loan volume and revenue by 89 and 93 percent.[267] Given these dramatic impacts, the Bureau has substantial concerns about the ongoing viability of the covered loan market more broadly and its effects on consumer access to credit.

As discussed in part V.B.1, the Bureau concludes that consumers would have access to credit and non-credit covered loan alternatives if the 2017 Final Rule went into effect. These would include a variety of payday loan alternatives and credit offered by fintechs, credit unions, and other mainstream financial institutions.

But the Bureau also concludes that the 2017 Final Rule's systemic impacts on the payday market, absent the principal step-down exemption, would prevent consumers who prefer covered loans from accessing them, notwithstanding the availability of other products that they may not prefer. For purposes of this countervailing benefits analysis, the Bureau accepts the 2017 Final Rule's conclusion that the longer-term borrowers identified by the Bureau cannot reasonably avoid taking out loans. Thus, for purposes of this analysis, the Bureau does not posit that these longer-term borrowers prefer payday loans. But the 2017 Final Rule also emphasized that it did not disagree with Professor Mann that there are also "borrowers who remain in debt for a relatively short period, who constitute a majority of all borrowers, and who do not appear to systematically fail to appreciate what will happen to them when they re-borrow."[268] As the Rule noted, there are "many individuals" who "appear to have anticipated short durations of use with

---

[266] 82 FR 54472, 54826, 54833.

[267] *Id.* at 54834.

[268] 82 FR 54569.

reasonable accuracy."[269] Many borrowers appear to prefer payday loans to other products that are currently available to them. This could be for a number of reasons, depending upon the individual, including the speed and convenience of the borrowing process, easy loan approval, and the ability to take out a loan without a traditional credit check. The available data does not explain the precise characteristics of borrowers' preferences for payday loans compared to other current alternatives, and there is also some uncertainty about how those alternatives may evolve in the future. Nevertheless, the Bureau believes that the Rule's large impacts on the payday market, absent the principal step-down exemption, will deprive them of their preferred form of credit.

The Bureau also finalizes its more specific preliminary determinations regarding the 2017 Final Rule's effects on certain segments of covered loan users: repayers, reborrowers, and defaulters. With respect to repayers, the Bureau concludes that the 2017 Final Rule understated the risk that repayers would be denied a loan and that a countervailing benefit of permitting lenders to engage in the identified practice is that it makes it possible to offer loans on a wide-scale basis to repayers. With respect to reborrowers, the Bureau concludes that there are substantial countervailing benefits that flow from the identified practice, such as income-smoothing and avoiding a greater harm (*e.g.*, eviction, overdue utility bills, or other types of expenses), which the 2017 Final Rule discounted. With respect to defaulters, the Bureau concludes that the 2017 Final Rule erroneously minimized the value of the temporary reprieve.

---

[269] *Id.* at 54570. Research by the Bureau found that 80 percent to 85 percent of payday borrowers succeed in repaying their loans, of which between 22 percent and 30 percent do so after receiving a single loan while the remainder repaid after reborrowing one or more times. The Bureau found that borrowers end up taking out seven or more loans in a row 27 to 33 percent of the time. Bureau of Consumer Fin. Prot., *Supplemental findings on payday, payday installment, and vehicle title loans and deposit advance products*, at 120, 123 (June 2016), https://files.consumerfinance.gov/f/documents/Supplemental_Report_060116.pdf.

In support of these conclusions, the Bureau notes that industry commenters who provided feedback on the topic uniformly agreed with the proposed reassessment in the 2019 NPRM of the benefits to repayers, reborrowers, and defaulters. The Bureau acknowledges that consumer group commenters generally disagreed with the 2019 NPRM's reweighing of benefits to certain groups, but these commenters did not provide evidence or raise arguments that lead the Bureau to reconsider its preliminary determinations. In particular, the Bureau is unpersuaded by a comment that the 2017 Final Rule would preserve appropriate access to covered loans for repayers and reborrowers and only restrict covered loans among defaulters who are most likely to be injured by covered loans. Given the 2017 Final Rule's dramatic impacts—which itself estimated would extinguish 89 to 93 percent of covered loan volume—the Bureau does not believe that there would be a viable market to provide covered loans to repayers and reborrowers because most lenders (especially those that only offer covered loans) could not continue to provide covered loans in such a shrunken market.

With respect to a comment that the 2019 NPRM's proposed reassessment did not consider the magnitude of harm across groups (*i.e.*, the harm suffered by defaulters is greater than the benefit to repayers and reborrowers), the Bureau disagrees. The Bureau has consistently emphasized, in both the 2017 Final Rule and the 2019 NPRM, that the appropriate approach to this analysis is to compare the aggregate substantial injury that is not reasonably avoidable across all consumers experiencing such injury with the aggregate benefits to all consumers who are benefitted, quantifying aggregate injury and benefits if feasible but relying on qualitative analysis if it is not. This is different from simply counting the numbers of individual consumers who experienced a net harm or net benefit. The 2019 NPRM did not reconsider the 2017 Final Rule's characterization of the aggregate injury. In reconsidering the aggregate benefits, the 2019

NPRM provided a qualitative description of why the Bureau is reconsidering the magnitudes of the countervailing benefits to repayers, reborrowers, and defaulters.

The Bureau notes that although the 2017 Final Rule would reduce access to covered loans, commenters did not provide evidence that the rule would drive consumers toward unregulated or more expensive alternatives. The 2017 Final Rule determined that limiting the number of covered loans would not lead to more unregulated or illegal loans, and the Bureau concludes that the evidentiary record is not sufficient to revoke this specific finding.[270]

The Bureau is also unpersuaded by the specific argument that consumer sentiment measures, such as purportedly low volumes of consumer complaints about payday loans, which are typically made without an ability-to-repay assessment, are indicative of consumer benefit. As the Bureau has suggested before, this argument is based on a flawed premise. An absence of consumer complaints does not lead to an inference of consumer benefit. There are many reasons why consumers do not complain even though they may not benefit from a product, or, more specifically here, from a practice relating to a product.

The Bureau also disagrees with commenters that argued that the 2019 NPRM mischaracterized the 2017 Final Rule's findings. In asserting that the 2017 Final Rule would reduce payday loan revenue and volume by 89 to 93 percent of all loans, the Bureau based this statement on simulations from the 2017 Final Rule.[271] By using the phrase "of all loans," the 2019 NPRM implicitly referred to all "covered" loans, which are at issue in this rulemaking, not access to credit generally. Although the 2019 NPRM specifically discussed covered loans in this

---

[270] 82 FR 54472, 54610 (citing Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why*, at 19-24, https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf).

[271] *Id.* at 54817, 54834-35.

passage, the Bureau reiterates its broader concerns that the 2017 Final Rule's dramatic impacts on revenue and volume will critically undermine the viability of covered loans to the detriment of consumers.

Accordingly, the Bureau concludes that the 2017 Final Rule underestimated the identified practice's benefits to consumers. The 2017 Final Rule found that "a substantial population of borrowers is harmed, many severely," by the identified unfair practice.[272] The Bureau is conscious of the 2017 Final Rule's findings regarding that injury and has not reconsidered them in this rulemaking. Nevertheless, the 2017 Final Rule believed that identifying an unfair practice with the goal of protecting longer-term borrowers would have relatively little cost for the broader population of borrowers who take out covered loans. But this analysis was reliant upon a principal step-down exemption that obscured the true impact on borrowers if the identified unfair practice were proscribed, and it placed too little weight on the benefits to borrowers from access to their preferred form of credit.

b. Countervailing Benefits to Competition

The Bureau's Proposal

As with its discussion of the countervailing benefits to consumers, the 2017 Final Rule analyzed the countervailing benefits to competition through the lens of the principal step-down exemption. Specifically, the 2017 Final Rule acknowledged that "a certain amount of market consolidation may impact . . . competition" but asserted that this effect would be modest and would not reduce meaningful access to credit because of the principal step-down exemption.[273] For the reasons previously discussed, in the 2019 NPRM the Bureau preliminarily determined

[272] *Id.* at 54591.

[273] *Id.* at 54611-12.

that the Bureau should not have factored into its analysis this exemption but rather should have analyzed the effect on competition from the identified practice. Lenders would not be able to make upwards of 90 percent of the loans they would be able to make if the identified practice were not prohibited. The Bureau preliminarily determined in the 2019 NPRM that this decrease in lending activity would have a dramatic effect on competition, especially if lenders cannot stay in business in the face of such decreases in revenue from lending.

The Bureau recognized in the 2019 NPRM that because of State-law regulation of interest rates, the effect of reduced competition may not manifest itself in higher prices. However, according to the 2019 NPRM, payday and vehicle title lenders compete on non-price dimensions and a rule which caused at least a 90 percent reduction in lending would likely materially impact such competition.

The Bureau also noted that, as the 2017 Final Rule recognized, a number of innovative products are seeking to compete with traditional short-term lenders. Some of these products assist consumers in finding ways to draw on the accrued cash value of wages that have been earned but not yet paid, while other products take the form of extensions of credit.[274] Other innovators are also providing emergency assistance at no cost to consumers through a tip model.[275] The 2017 Final Rule included exclusions to accommodate these emerging products, thereby recognizing that providers offering these products were doing so without assessing the consumers' ability to repay without reborrowing. The Bureau therefore preliminarily believed that a prohibition of making short-term or longer-term balloon-payment loans without assessing consumers' ability to repay would constrain innovation in this market.

[274] 12 CFR 1041.3(d)(7).

[275] 12 CFR 1041.3(d)(8).

The Bureau preliminarily determined in the 2019 NPRM that these countervailing benefits to competition provide an additional reason to conclude that the countervailing benefits to consumers and to competition outweigh the substantial injury that the Bureau considered in the 2017 Final Rule to not be reasonably avoidable by consumers. The Bureau invited comment on these preliminary conclusions.

Comments Received

Some commenters stated that the 2017 Final Rule would negatively impact competition by reducing the number of covered lenders. At least one commenter stated that ability-to-repay determination requirements would impose burdensome manual administrative processes and information gathering requirements for income verification, which are not cost-efficient for small-dollar lending. A commenter stated that the 2017 Final Rule would be particularly burdensome for small entities. Some commenters criticized the Bureau for not adequately studying the economic impacts of the 2017 Final Rule. For example, a commenter asserted that the Bureau never conducted a "profitability analysis" to determine how many stores would stay in business if the Mandatory Underwriting Provisions went into effect.

Two academic commenters stated that fewer market participants may lead to a lower supply of credit and higher prices because loan prices and loan sizes do not invariably rise to State-level maximums. Other commenters agreed that the price of credit would increase and stated that lenders may limit credit approvals to borrowers with higher credit profiles.[276] Some

[276] A commenter noted that when the UK Financial Conduct Authority capped interest rates on payday loans in 2015, the ensuing 60 percent plunge in loan originations was accompanied by a decline in the share of low-borrowers, from 50 percent to 35 percent of loans. Fin. Conduct Auth., *High-Cost Credit: Including Review of the High-Cost Short-Term Credit Price Cap* (July 2017), https://www.fca.org.uk/publication/feedback/fs17-02.pdf; Social Market Foundation, *A Modern Credit Revolution: An Analysis of the Short-Term Credit Market* (2016), https://cfa-uk.co.uk/wp-content/uploads/2016/11/SMF-Report-AKT10796.pdf.

commenters stated that fewer market participants would increase consumer search costs, particularly for rural consumers.[277]

Several commenters stated that the 2017 Final Rule would constrain innovation, particularly in credit risk models and underwriting strategies. Some commenters stated that the 2017 Final Rule could hinder innovation at community banks and credit unions, even though these institutions largely are exempt from the ability-to-repay requirements pursuant to 12 CFR 1041.3(e)(4) and (f), and that it is crucial that the Bureau provide these institutions with the flexibility to underwrite and structure small-dollar loans. A trade association stated that the elimination of the 2017 Final Rule's Mandatory Underwriting Provisions will likely encourage credit unions and banks to adopt short-term, small-dollar lending programs.

In contrast, other commenters stated that the 2017 Final Rule would have a limited impact on competition. As discussed above, some commenters believed that the 2019 NPRM mischaracterized the 2017 Final Rule, which did not conclude that a decrease in covered loan volume and revenues would lead to a commensurate decrease in overall credit availability. Other commenters also stated that the 2019 NPRM adduced no new evidence regarding the number of storefront payday lenders that will be affected by the 2017 Final Rule.

Some commenters stated that, even if the 2017 Final Rule resulted in fewer covered lenders, consumers would not be negatively affected. In reaction to the 2019 NPRM, an academic commenter accused the Bureau of confusing "competitors" with "competition." Some

---

[277] Commenters cited several studies to suggest that lenders in rural areas would see a steeper revenue decline than those in urban areas. *See* Thomas Miller & Onyumbe Enumbe Ben Lukongo, *Adverse Consequences of the Binding Constitutional Interest Rate Cap in the State of Arkansas* (Oct. 2017), https://www.mercatus.org/publications/constitutional-interest-rate-cap-arkansas; Charles River Assocs., *Economic Impact on Small Lenders of the Payday Lending Rules under Consideration by the CFPB* (2015), http://www.crai.com/publication/economic-impact-small-lenders-payday-lending-rules-under-consideration-cfpb.

commenters stated that the 2017 Final Rule found that while consolidation may occur in the market, competitiveness would not be affected in the form of higher consumer prices—because lenders uniformly charge the maximum permitted by State law—or the distance that consumers would have to travel to procure loans.[278] One commenter stated that a decrease in the covered lenders and loan volume might actually lead to healthier competition that enhances consumer welfare. According to the commenter, payday lending is an unusual market in which low barriers to entry and few unique consumers per store result in cannibalistic competition that drives up prices. Citing the experience in Colorado, the commenter stated that with fewer lenders in the market, there would be more borrowers per store and lower prices per borrower as costs would be amortized over a larger borrower base.[279]

Some commenters stated that the 2017 Final Rule would benefit, not hinder, innovation. These commenters stated that payday lenders crowd out alternative forms of credit by disadvantaging lenders that underwrite or provide more fulsome disclosures. Some commenters state that restrictions on covered loans creates space for innovation for loans at various price points and durations greater than 45 days, expanding access to manageable credit, driving out inferior products, and improving consumer choice over time. A commenter cited a study to support the notion that borrowers desire alternatives to covered loans that can be repaid in longer terms and smaller installments.[280]

---

[278] 82 FR 54472, 54601.

[279] Following its reform, the number of payday lenders in Colorado substantially contracted, but the lending volume remained stable and the cost of loans dropped. *See* Pew Charitable Trusts, *Trial, Error, and Success in Colorado's Payday Lending Reforms* (Dec. 2014), *https://www.pewtrusts.org/~/media/assets/2014/12/pew_co_payday_law_comparison_dec2014.pdf*.

[280] *See* Pew Charitable Trusts, *Payday Loan Customers Want More Protections, Access to Lower-Cost Credit From Banks* (Apr. 2017), *https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/04/payday-loan-customers-want-more-protections-access-to-lower-cost-credit-from-banks*.

Other commenters noted that in the 2019 NPRM the Bureau did not offer evidence showing how not assessing ability-to-repay improves the availability of affordable products for consumers. A commenter stated that in unregulated States, there is no evidence that increased competition creates better products for consumers. A commenter stated that without guardrails and regulation, revoking the 2017 Final Rule would encourage new types of business models that harm consumers.

Final Rule

The Bureau concludes that the reduction in covered loan volume and revenue resulting from the Mandatory Underwriting Provisions would result in a corresponding reduction in competition in the covered loan market. The 2017 Final Rule's estimates predicted that without the conditional exemption covered loan revenue and volume would fall by 89 to 93 percent.[281] The Bureau determines that competition inevitably would suffer from a contraction in loan volume and revenues of this magnitude. The 2017 Final Rule itself compels a conclusion that this contraction will impact the size of the covered loan market. According to the 2017 Final Rule, "[to] the extent that lenders cannot replace reductions in revenue by adapting their products and practices, Bureau research suggests that the ultimate net reduction in revenue will likely lead to contractions of storefronts of a similar magnitude, at least for stores that do not have substantial revenue from other lines of business. . . ."[282]

The Bureau concludes that this reduction in covered loan providers would harm competition. As noted in the 2019 NPRM, the Bureau recognizes that higher loan prices may not

[281] 82 FR 54472, 54817, 54834-35.

[282] *Id.* at 54835.

necessarily result from reduced competition assuming that covered lenders typically charge State-level maximums so covered lenders generally are unable lawfully to raise prices for credit.[283] But the reduction in covered lenders may have effects on non-price competition among lenders, including competing on the basis of convenience through number of locations, thereby increasing consumer search costs when seeking covered loans. This increase will particularly affect rural consumers, especially those with limited Internet access.

The Bureau also concludes that the 2017 Final Rule would constrain rapid innovation in the market. The 2017 Final Rule would stifle lender innovation, particularly in developing credit risk models and underwriting strategies that better meet both lenders' and consumers' needs. The Bureau points to the remarkable innovation in the short-term, small-dollar credit market that has occurred in the absence of the 2017 Final Rule's Mandatory Underwriting Provisions. The Bureau is concerned that, if not revoked, the Mandatory Underwriting Provisions may stifle this activity. For example, the Bureau determines that, as commenters suggested, not revoking the Mandatory Underwriting Provisions may hinder the adoption of short-term, small-dollar lending programs by lenders that adopt new credit risk models and strategies. These new methods do not appear to meet or be likely to meet the specific ability-to-repay requirements that were set forth in the Mandatory Underwriting Provisions of the 2017 Final Rule, and, therefore, consumers might not be able to choose these products if such requirements were applicable.

Accordingly, the Bureau concludes that the 2017 Final Rule undervalued the identified practice's benefits to competition. The 2017 Final Rule would reduce the number of lenders nationwide, which would have non-price effects, including increasing consumer search costs. This increase will particularly affect rural consumers, especially those without Internet access.

---

[283] 84 FR 4252, 4274.

The Bureau also determines that the 2017 Final Rule would constrain innovation, including in the development of credit risk models and underwriting strategies.

3. Conclusion on Countervailing Benefits

Accordingly, the Bureau concludes that the identified practice's countervailing benefits to consumers and to competition must be reweighed. After doing so, the Bureau concludes that these countervailing benefits in the aggregate outweigh any substantial, not-reasonably-avoidable injury to consumers where lenders make covered loans to them without determining consumers' ability to repay those loans. The 2017 Final Rule found that "a substantial population of borrowers is harmed, many severely," by the identified unfair practice.[284] The Bureau assumes for purposes of this countervailing benefits analysis the 2017 Final Rule's findings regarding that injury. Nevertheless, in its countervailing benefits analysis, the 2017 Final Rule determined that identifying an unfair practice with the goal of protecting longer-term borrowers would have relatively little cost for the broader population of covered loan users and for competition. But the 2017 Final Rule's analysis relied on a principal step-down exemption that obscured the true impact of proscribing the identified unfair practice, and it undervalued the benefits to borrowers from having access to their preferred form of credit and to the benefits to competition. Reconsidering these factors, the Bureau concludes that these countervailing benefits to consumers and to competition, in the aggregate, outweigh the relevant injury,[285] and, therefore, the identified practice does not satisfy the final prong of the test for unfairness under section 1031(c) of the Dodd-Frank Act.

---

[284] 82 FR 54472, 54591.

[285] Because the Bureau is finalizing the 2019 NPRM's conclusions that both the benefits to consumers and the benefits to competition should be weighed more heavily than in the 2017 Final Rule, and that together they outweigh the relevant injury, the Bureau need not decide whether the benefits to consumers alone or the benefits to competition alone would outweigh the relevant injury.

D. Conclusion on Unfairness

Based on its analysis in parts V.B through V.C above, the Bureau concludes that it should no longer identify an unfair under section 1031(c) of the Dodd-Frank Act the practice set out in § 1041.4. Three discrete and independent grounds justify this conclusion. First, as set out in part V.B.1, the Bureau determined that the 2017 Final Rule should have applied a different interpretation of the reasonable avoidability element of unfairness under section 1031(c)(1)(A) of the Dodd-Frank Act. The Bureau concludes that the findings of an unfair practice as identified in § 1041.4 rested on applications of section 1031(c) of the Dodd-Frank Act that the Bureau should no longer use given the identification of better interpretations of these statutory provisions.

Second, as set out in part V.B.2, the Bureau determined that even under the 2017 Final Rule's interpretation of reasonable avoidability, the evidence underlying this finding is insufficiently robust and reliable.

Third, the Bureau also determines that countervailing benefits to consumers and to competition in the aggregate outweigh the substantial injury that is not reasonably avoidable as identified in the 2017 Final Rule, injury which the Bureau assumes for purposes of this analysis. That is, as set out in part V.C.1, the Bureau should have excluded the principal step-down exemption in its calculation of countervailing benefits in the 2017 Final Rule, and in light of this and other factors, as set out in part V.C.2, the countervailing benefits to the identified practice outweigh substantial injury that is not reasonably avoidable.

Based on these cumulative findings, the Bureau revokes the portion of § 1041.4 which identifies the failure to conduct an ability-to-repay assessment in connection with making a covered short-term or longer-term balloon-payment loan as an unfair practice.

VI. Amendments to the 2017 Final Rule to Eliminate its Mandatory Underwriting Provisions—Revoking the Identification of Abusive Practices

The Bureau determines that the factual and legal grounds provided in the 2017 Final Rule do not support its conclusion that the identified practice is abusive under section 1031 of the Dodd-Frank Act, thereby eliminating that as a basis for the Mandatory Underwriting Provisions to address that conduct.[286]

Part VI.A considers the core principles of abusiveness under Dodd-Frank Act section 1031(d). Part VI.B reviews the factual findings and legal conclusions underlying this use of authority in the 2017 Final Rule. Part VI.C considers the two different abusiveness theories underlying the abusiveness finding in § 1041.4 of the 2017 Final Rule: the "lack of understanding" theory, and the "inability to protect" theory. First, part VI.C.1 reviews the Bureau's reasons for determining that, under section 1031(d) of the Dodd-Frank Act, the Bureau no longer identifies the practices as abusive under a "lack of understanding" theory as set out in § 1041.4 of the 2017 Final Rule. Second, part VI.C.2 sets forth the Bureau's reasons for determining that, under section 1031(d) of the Dodd-Frank Act, the Bureau no longer identifies the practices as abusive under an "inability to protect" theory as set out in § 1041.4 of the 2017 Final Rule.[287]

---

[286] The rulemaking addresses the legal and evidentiary bases for particular rule provisions identified in this final rule. It does not prevent the Bureau from exercising tool choices, such as appropriate exercise of supervision and enforcement tools, consistent with the Dodd-Frank Act and other applicable laws and regulations. It also does not prevent the Bureau from exercising its judgment in light of factual, legal, and policy factors in particular circumstances as to whether an act or practice meets the standards for abusiveness under section 1031 of the Dodd-Frank Act.

[287] The Bureau notes that, alongside covered short-term loans, the 2017 Final Rule included covered longer-term balloon-payment loans within the scope of the identified unfair and abusive practice. The Bureau stated that it was concerned that the market for covered longer-term balloon-payment loans, which is currently quite small, could expand dramatically if lenders were to circumvent the Mandatory Underwriting Provisions by making these loans without assessing borrowers' ability to repay. 82 FR 54472, 54583-84. The Bureau did not separately analyze the

A. Background on Abusiveness

Section 1031(a) of the Dodd-Frank Act provides that the Bureau may use its enforcement authority, among other things, to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.[288] Since its inception, the Bureau has used its supervisory and enforcement authority to identify and seek relief where covered persons engage in unfair, deceptive, or abusive acts or practices (UDAAPs).

The statutory standard for what the Bureau has authority to declare an "abusive act or practice" is set forth in section 1031(d) of the Dodd-Frank Act. Specifically, section 1031(d) states that the Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice—(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of—(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the

---

elements of unfairness and abusiveness for covered longer-term balloon-payment loans. *See id.* at 54583 n.626. Because the Bureau's identification in the Rule as to covered longer-term balloon-payment loans was predicated on its identification as to covered short-term loans, the Bureau proposed that if the latter is revoked the former should also be revoked. The Bureau received no comments that change this conclusion as to covered longer-term balloon-payment loans and finalizes it as proposed.

[288] Public Law 111-203, tit. X, sec. 1031(a), 124 Stat. 1376, 2005 (2010) (codified at 12 U.S.C. 5531(a)).

consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[289]

Through the language in section 1031(d), Congress defined the abusiveness standard in general terms and did not attempt to include a complete list of abusive practices. To demonstrate a violation of section 1031(d), the Bureau therefore must satisfy the specific elements of sections 1031(d)(1), 1031(d)(2)(A), 1031(d)(2)(B), or 1031(d)(2)(C).

At the Federal level, the FTC and Federal banking regulators traditionally have protected consumers through the prohibitions on unfair and deceptive acts and practices in the FTC Act as well as through the prohibitions and requirements included in special statutes, such as the Truth in Lending Act[290] and the Fair Credit Reporting Act.[291] The Dodd-Frank Act added to these consumers protections the first Federal prohibition on abusive acts or practices with respect to consumer financial products and services generally.[292] Although Congress, through the language in section 1031(d), provided some indication of the abusiveness standard, the Dodd-Frank Act does not further elaborate on the meaning of the terms used in section 1031(d), and there is relatively limited legislative history discussing the meaning of the language in section 1031(d) (including in distinguishing the abusiveness standard from the deception and unfairness

[289] 12 U.S.C. 5531(d).

[290] 15 U.S.C. 1601 *et seq.*

[291] 15 U.S.C. 1681 *et seq.*

[292] Certain other Federal consumer financial laws, including the Fair Debt Collection Practices Act (FDCPA) and the Home Ownership and Equity Protection Act (HOEPA), reference either the term "abusive" or "abuse." *See* 15 U.S.C. 1692d (FDCPA), 12 U.S.C. 1639(p)(2)(B) (HOEPA). The Telemarketing and Consumer Fraud and Abuse Prevention Act, Public Law 103-297, 108 Stat. 1545 (1994), also directed the FTC to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." *See* 15 U.S.C. 6102(a)(1).

standards).[293] Moreover, the abusiveness standard does not have the long and rich history of the deception and unfairness standards. The FTC has used its authority under the FTC Act to address unfair and deceptive acts or practices (UDAPs) for more than 80 years, over which time policy statements, administrative and judicial precedent, and statutory amendments have provided important clarifications about the meaning of unfairness and deception.[294] Federal prudential regulators have also enforced the UDAP prohibitions in the FTC Act since before the Bureau's existence.

The Dodd-Frank Act authorizes the Bureau to engage in supervision, enforcement, and rulemaking for the purpose of ensuring that "consumers are protected from unfair, deceptive, or abusive acts and practices."[295] The Bureau believes that Congress intended for the statutory phrase "abusive acts or practices" to encompass conduct by covered persons that is beyond what would be prohibited as unfair or deceptive acts or practices, although such conduct could overlap and thus satisfy the elements for more than one of the standards.[296] As relevant to this

---

[293] *See, e.g.*, S. Rep. No. 111-176, at 172 (2010) ("Current law prohibits unfair or deceptive acts or practices. The addition of 'abusive' will ensure that the Bureau is empowered to cover practices where providers unreasonably take advantage of consumers."); Public Law 111-203, pmbl. (listing, in the preamble to the Dodd-Frank Act, one of the purposes of the Act as "protect[ing] consumers from abusive financial services practices"); *see also* S. Rep. No. 111-176, at 9 n.19 ("Today's consumer protection regime . . . could not stem a plague of abusive and unaffordable mortgages."); *id.* at 11 ("This financial crisis was precipitated by the proliferation of poorly underwritten mortgages with abusive terms."); H.R. Rep. No. 111-376, at 91 (2009) ("Th[e] disparate regulatory system has been blamed in part for the lack of aggressive enforcement against abusive and predatory loan products that contributed to the financial crisis, such as subprime and nontraditional mortgages."); H.R. Rep. No. 111-517, at 876-77 (2010) (Conf. Rep.) ("The Act also prohibits financial incentives . . . that may encourage mortgage originators . . . to steer consumers to higher-cost and more abusive mortgages."). *See also* the legislative history discussed in the 2017 Final Rule, 82 FR 54472, 54521.

[294] *See, e.g.*, Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Comm. on Commerce, Science and Transportation, U.S. Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), *reprinted in In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984); Letter from the FTC to Hon. John D. Dingell, Chairman, Comm. on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983) (FTC policy statement on deception), *reprinted in In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984); *Int'l Harvester Co.*, 104 F.T.C. at 949; *AFSA*, *supra*; section 5(n) of the FTC Act, 15 U.S.C. 45(n), as enacted by the Federal Trade Commission Act Amendments of 1994, Public Law 103-312, sec. 9, 108 Stat. 1691, 1695.

[295] 12 U.S.C. 5511(b)(2).

[296] *See* 82 FR 54472, 54621.

rulemaking, section 1031(d)(2) protects consumers that have the particular vulnerabilities that Congress identified in the statute from harms that unreasonably take advantage of those vulnerabilities.

B. Overview of the Factual Predicates and Legal Conclusions Underlying the Identification of Abusive Practices in Section 1041.4

Section 1031(d)(2) of the Dodd-Frank Act states in pertinent part that the Bureau shall have no authority to declare an act or practice abusive unless the act or practice "takes unreasonable advantage" of either (A) "a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;" or (B) "the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service."[297] The Bureau, in imposing the Mandatory Underwriting Provisions, relied on both of these prongs of the abusiveness standard.

With respect to the "lack of understanding" prong set forth in section 1031(d)(2)(A) of the Dodd-Frank Act, the Bureau acknowledged in the 2017 Final Rule that consumers who take out covered short-term or longer-term balloon-payment loans "typically understand that they are incurring a debt which must be repaid within a prescribed period of time and that if they are unable to do so they will either have to make other arrangements or suffer adverse consequences."[298] However, in the 2017 Final Rule the Bureau interpreted "understanding" to require more than a general awareness of possible negative outcomes. Rather, the Bureau stated

[297] 12 U.S.C. 5531(d)(2)(A), (B). Section 1031(d)(1) and (d)(2)(C) of the Dodd-Frank Act provide alternative grounds on which a practice may be deemed to be abusive, but the Bureau did not rely on either of those grounds for the Mandatory Underwriting Provisions.

[298] 82 FR 54472, 54615 (summarizing the Bureau's rationale for the 2016 NPRM).

that consumers lack the requisite level of understanding if they do not understand both their own individual "likelihood of being exposed to the risks" of the product or service in question and "the severity of the kinds of costs and harms that may occur."[299] The Bureau in the 2017 Final Rule found that "a substantial portion of borrowers, and especially those who end up in extended loan sequences, are not able to predict accurately how likely they are to reborrow."[300] This finding also was based primarily on the Bureau's interpretation of limited data from the Mann study and is discussed further below.[301]

With respect to the alternative "inability to protect" prong of abusiveness set forth in section 1031(d)(2)(B) of the Dodd-Frank Act, the Bureau began by finding in the 2017 Final Rule that consumers who lack an understanding of the material costs and risks of a product often will be unable to protect their interests.[302] The Bureau's analysis found that consumers who use short-term loans "are financially vulnerable and have very limited access to other sources of credit" and that they have an "urgent need for funds, lack of awareness or availability of better alternatives, and no time to shop for such alternatives."[303] The Bureau also found in the 2017 Final Rule that consumers who take out an initial loan without the lender's reasonably assessing the borrower's ability to repay were generally unable to protect their interests in selecting or using further loans.[304] According to the 2017 Final Rule, consumers who obtain loans without an ability-to-pay determination and who in fact lack the ability to repay may have to choose

[299] *Id.* at 54617.

[300] *Id.* at 54615.

[301] *See id.*

[302] *Id.* at 54618.

[303] *Id.* at 54618-20.

[304] *Id.* at 54619.

between competing injuries—default, delinquency, reborrowing, and default avoidance costs, including forgoing essential living expenses.[305] The Bureau concluded that, "though borrowers of covered loans are not irrational and may generally understand their basic terms, these facts do[] not put borrowers in a position to protect their interests."[306]

In support of the conclusion that consumers with payday loans could not protect their own interests, in the 2017 Final Rule the Bureau relied primarily on a survey of payday borrowers conducted by the Pew Charitable Trusts (Pew study).[307] In the Pew study, 37 percent of borrowers reported that at some point in their lives they had been in such financial distress that they would have taken a payday loan on "any terms offered."[308] The Bureau viewed this study as showing that borrowers of short-term loans "may determine that a covered loan is the only option they have."[309] The Pew study is discussed further below in part VI.C.2.b(1).

After determining that consumers lack understanding of the material risks, costs, or conditions of covered short-term and longer-term balloon-payment loans and that consumers are unable to protect their interests in selecting or using such products, the Bureau went on to conclude in the 2017 Final Rule that by making such loans to consumers without first assessing the consumers' ability to repay, lenders took unreasonable advantage of these consumers' vulnerabilities. In reaching this conclusion, the Bureau acknowledged that section 1031(d) of the Dodd-Frank Act "does not prohibit financial institutions from taking advantage of their superior

---

[305] *Id.*

[306] *Id.* at 54620.

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

[308] *See id.* (citing the Pew study at 20); *see also* 82 FR 54472, 54618-19 (further discussing the Pew study).

[309] 82 FR 54472, 54619.

knowledge or bargaining power" and that "in a market economy, market participants with such advantages generally pursue their self-interests."[310] The Bureau stated, however, that section 1031(d) of the Dodd-Frank Act "makes plain that there comes a point at which a financial institution's conduct in leveraging its superior information or bargaining power becomes unreasonable advantage-taking" and the Bureau understood the statute to delegate to the Bureau "the responsibility for determining when that line has been crossed."[311] The Bureau in the 2017 Final Rule did not identify any specific threshold, but nonetheless found that "many lenders who make such loans have crossed the threshold."[312]

In support of its conclusion that lenders take unreasonable advantage of consumers of covered short-term and longer-term balloon-payment loans, the Bureau in the 2017 Final Rule pointed to a range of lender practices, including the design of the loan products, the way they are marketed, the absence of meaningful underwriting, the limited repayment options and the way those are presented to consumers, and the collection tactics used when consumers fail to repay.[313] The Bureau stated that "the ways lenders have structured their lending practices here fall well within any reasonable definition" of what it means to take unreasonable advantage under section 1031(d) of the Dodd-Frank Act.[314] The Bureau then singled out specifically the failure to underwrite and concluded that lenders take unreasonable advantage in circumstances if they make covered short-term loans or covered longer-term balloon-payment loans without reasonably assessing the consumer's ability to repay the loan according to its terms.[315]

---

[310] *Id.* at 54621.

[311] *Id.*

[312] *Id.* at 54622.

[313] *Id.* at 54622-23.

[314] *Id.* at 54623.

[315] *Id.*

C. Abusiveness Theories

1. Takes Unreasonable Advantage of Consumers' Lack of Understanding of Material Risks, Costs or Conditions

a. Takes Unreasonable Advantage

The Bureau's Proposal

In the 2019 NPRM, the Bureau reconsidered how the 2017 Final Rule applied section 1031(d)(2) of the Dodd-Frank Act, which proscribes abusive conduct that takes "unreasonable advantage" of certain consumer vulnerabilities enumerated in the statute. As described above, the Bureau in the 2017 Final Rule focused on two such vulnerabilities in connection with evaluating lenders making covered loans without making an ability-to-repay determination—both lack of consumer understanding and inability to protect their own interests. The Bureau in the 2017 Final Rule stated that there comes a point at which a financial institution's conduct in leveraging its superior information or bargaining power relative to consumers becomes unreasonable advantage-taking, and that the Dodd-Frank Act delegates to the Bureau the responsibility for determining when advantage-taking has become unreasonable.[316] The Bureau's unreasonable advantage analysis applied a multi-factor analysis, concluding that:

> At a minimum lenders take unreasonable advantage of borrowers when they [1] develop lending practices that are atypical in the broader consumer financial marketplace, [2] take advantage of particular consumer vulnerabilities, [3] rely on a business model that is directly inconsistent with the manner in which the product is marketed to consumers, and [4] eliminate or sharply limit feasible conditions on the offering of the product (such as underwriting and amortization, for example) that would reduce or mitigate harm for a substantial population of consumers.[317]

---

[316] *Id.* at 54621.

[317] *Id.* at 54623 (bracketed numbers added).

The Bureau in the 2019 NPRM decided to reassess this application of section 1031(d)(2) of the Dodd-Frank Act in light of the four factual considerations identified in the 2017 Final Rule. According to the 2019 NPRM, this inquiry is inherently a question of judgment in light of the factual, legal, and policy considerations that can inform what is taking reasonable or unreasonable advantage in particular circumstances. Upon further consideration of the approach in the 2017 Final Rule, the Bureau preliminarily determined in the 2019 NPRM that the application of the factual circumstances cited in the 2017 Final Rule do not support the conclusion that payday lenders took unreasonable advantage of consumers through making payday loans to them without determining they had the ability to repay those loans.

First, insofar as the Bureau in the 2017 Final Rule focused on the atypicality of granting credit without assessing ability to repay, the Bureau in the 2019 NPRM questioned whether this practice was an appropriate indicator that lenders took unreasonable advantage of consumers. Although the Bureau pointed to the fact that the practice of extending credit without assessing ability to repay is an unusual one, the 2019 NPRM stated that it is common with regard to credit products for consumers who lack traditional indicia of creditworthiness—for example, credit products for consumers with little or no credit history, loans for students, or reverse mortgages for the elderly. Further, the Bureau preliminarily determined that innovators and new entrants into product markets often engage in practices that deviate from established industry norms and conventions. Many such practices are by definition atypical. Thus, according to the 2019 NPRM, to presume that atypicality is inherently suggestive that a lender has taken unreasonable advantage of consumers would risk stifling innovation. The 2019 NPRM stated that this reasoning suggests that even if payday lenders not making ability-to-repay determinations about consumers before extending them loans was atypical, it still should not be viewed as inherently suggestive that lenders took unreasonable advantage of consumers in these circumstances, given differences between particular consumer financial markets and the needs of consumers in such varying markets.

Second, with regard to whether lenders making payday loans to consumers without determining that they have the ability to repay them takes unreasonable advantage of the particular consumer vulnerabilities, as discussed in greater detail in parts VI.C.1 and VI.C.2 below, the Bureau in the 2019 NPRM stated its preliminary conclusion that limitations in the record of the 2017 Final Rule, including issues related to the Bureau's interpretation of limited data from the Mann study and its interpretation of the Pew study, call into question the support for the Bureau's findings in the 2017 Final Rule regarding the degree of vulnerabilities of covered short-term and longer-term balloon-payment loan users. Even if the Bureau's findings in the 2017 Final Rule regarding user vulnerabilities were valid, the Bureau stated in the 2019 NPRM that it did not believe that they would independently support an unreasonable advantage-taking determination. The "takes unreasonable advantage" element in section 1031(d)(2) of the Dodd-Frank Act requires that an act or practice take advantage of a vulnerability specified by, as relevant here, section 1031(d)(2)(A) (lack of understanding) or section 1031(d)(2)(B) (inability to protect). The Bureau preliminarily determined in the 2019 NPRM that the 2017 Final Rule did not adequately explain how the practice of not reasonably assessing a consumer's ability to repay a loan according to its terms leveraged particular consumer vulnerabilities. On the contrary, the 2019 NPRM noted that covered short-term and longer-term balloon-payment loans are made available to the general public on standard terms, and the 2017 Final Rule did not conclude, for example, that lenders had the ability to identify consumers with particular vulnerabilities prior to lending and use that information to treat some consumers differently than others, for example, by charging them different prices or including different terms in contracts for them.[318]

Third, the 2019 NPRM asserted that the 2017 Final Rule conflated the significance of a consumer's understanding of a company's business model with the consumer's understanding of that company's products or services. The 2017 Final Rule stated that lenders' "business model—unbeknownst to borrowers—depends on repeated re-borrowing."[319] The 2017 Final Rule concluded that lenders take unreasonable advantage of consumers when they, in addition to other factors, "rely on a business model that is directly inconsistent with the manner in which the product is marketed to consumers."[320]

According to the 2019 NPRM, whether or not consumers understand the lender's revenue structure does not in itself determine whether they lack understanding about the features of the loan that they choose to take out. The 2019 NPRM stated that the Bureau in the 2017 Final Rule did not offer evidence that consumers erroneously believe or are misinformed by lenders that loans are offered only to those consumers who have the ability to repay without reborrowing. In the 2019 NPRM the Bureau expressed doubts that an inconsistency between a company's business model and its marketing of a product or service is a pertinent factor in assessing

[318] As previously noted, due to similarities between the unfairness provisions in the Dodd-Frank Act and the FTC Act, FTC Act precedent helps to inform the Bureau's understanding of unfairness under the Dodd-Frank Act. Although Dodd-Frank Act abusiveness authority is distinct, FTC Act precedent provides some factual examples that may help illustrate leveraging particular vulnerabilities of consumers. *See, e.g.*, FTC Unfairness Policy Statement, *Int'l Harvester*, 104 F.T.C. at 1074 (unfair practices may include exercising "undue influence over highly susceptible classes of purchasers, as by promoting fraudulent 'cures' to seriously ill cancer patients"); *In re Ideal Toy Corp.*, 64 F.T.C. 297, 310 (1964) ("False, misleading and deceptive advertising claims beamed at children tend to exploit unfairly a consumer group unqualified by age or experience to anticipate or appreciate the possibility that representations may be exaggerated or untrue.").

[319] 82 FR 54472, 54621.

[320] *Id.* at 54623.

whether the method of deciding to extend credit constitutes unreasonable advantage-taking. According to the 2019 NPRM, the 2017 Final Rule noted that "covered short-term loans are marketed as being intended for short-term or emergency use,"[321] but that appears to be a statement about how most consumers use these loans, not a statement about the lenders' revenue structures.[322]

Fourth, in considering whether payday lenders take unreasonable advantage of consumers through extending them loans without determining that consumers could repay them, the Bureau in the 2017 Final Rule considered lenders eliminating or sharply limiting feasible conditions that would reduce harm for a substantial portion of consumers. In the 2019 NPRM, the Bureau questioned whether a lender's decision not to offer such conditions constitutes unreasonable advantage-taking in this context. According to the 2019 NPRM, a lender's decision not to offer a short-term, non-amortizing product for which it does not determine whether consumers have the ability to repay may be reasonable given that some States constrain the offering of longer-term products. In addition, even if State law were not a constraint, longer-term, amortizing products would require lenders to assume credit risk over a longer period of time. The Bureau therefore preliminarily determined in the 2019 NPRM that this factor is not of significant probative value concerning whether lenders take unreasonable advantage of consumers by making payday loans to them without determining they have the ability to repay those loans.

For these reasons, the Bureau preliminarily determined in the 2019 NPRM that it did not have a sufficient basis to find that lenders take unreasonable advantage of consumers under

[321] *Id.* at 54616.

[322] Moreover, to the extent that certain lenders are using particular language to mislead consumers regarding either the features of loans or the lenders' own revenue structures, it is not clear that this is related to a failure to make an ability-to-repay determination. Rather, that would appear to be a fact-specific problem that is already unlawful under the Dodd-Frank Act's prohibition on deceptive acts or practices. *See* 12 U.S.C. 5531(a).

section 1031(d)(2) of the Dodd-Frank Act by making covered short-term loans or covered longer-term balloon-payment loans without reasonably assessing the consumer's ability to repay the loan according to its terms.

In the 2019 NPRM, the Bureau sought comment on this issue, including how the Bureau should interpret "taking unreasonable advantage" and the appropriate test for distinguishing between reasonable and unreasonable conduct under section 1031(d)(2) of the Dodd-Frank Act. The Bureau also sought comment about the extent to which firms make loans for other consumer financial products without engaging in traditional underwriting, such as what a bank would do before making an automobile loan or a consumer finance lender would do for a small business loan.

Comments Received

Industry-affiliated commenters generally agreed with the 2019 NPRM's preliminary determination. The majority of relevant industry comments addressed abusiveness in general terms. Without citing specific authority, a commenter stated that the revised interpretation of unreasonable advantage-taking better aligned with FTC precedent. Several commenters argued that under the common law and by common definition, an advantage is only unreasonable if it is extreme or excessive, outside the bounds of normal conduct, or there must be no rational reason to support the unfavorable advantage. According to commenters, the Bureau cannot find that covered loans, which are used by millions of consumers and permitted by a majority of State legislatures, are outside the bounds of normal conduct.

A number of commenters expressed general support for the preliminary findings in the 2019 NPRM regarding the factors in the 2017 Final Rule's four-factor test for determining whether a lender or other consumer financial services provider has taken unreasonable advantage of consumers. The one element of the four-factor test that commenters addressed in detail was whether atypicality is an appropriate indicator of unreasonable advantage-taking. A payday lender argued that the 2017 Final Rule presented no evidence that lenders do not assess ability-to-repay through manual underwriting at storefronts or centrally by use of credit reporting data. Other commenters argued that lenders employ various underwriting strategies and that foregoing burdensome underwriting is what makes it feasible for lenders to offer small-dollar loans.

In contrast, other commenters stated that the 2017 Final Rule correctly determined that lenders making payday loans without determining that consumers have the ability to repay takes unreasonable advantage of consumers. Some commenters generally argued that consciously lending to consumers with damaged credit who are unlikely to repay means that lenders are taking unreasonable advantage of consumers.

Commenters also specifically addressed the 2019 NPRM's analysis of the 2017 Final Rule's four-factor test for lenders taking unreasonable advantage of consumers. With respect to the first factor, some commenters argued that atypicality is an appropriate indicator of unreasonable advantage-taking. A commenter stated that mainstream consumer lending is based on ability to repay and atypicality is relevant because the unusual nature of a product speaks to whether consumers understand the product and can protect their interests. Further, commenters stated that the examples cited by the 2019 NPRM of consumer financial products offered without underwriting are misleading as many of those products do incorporate ability-to-repay assessments. Commenters suggested that Federal student loans have a back-end ability-torepay requirement in the form of income-driven repayment options and private student lenders do underwrite. Another commenter stated that reverse mortgage providers evaluate a borrower's ability to repay in the sense they evaluate a borrower's home equity. A commenter noted that

FHA-insured reverse mortgages and secured credit cards have formal ability-to-repay requirements pursuant to 24 CFR 206.205 and 15 U.S.C. 1665e, respectively. Further, a commenter argued that some of the 2019 NPRM's examples of other credit offered without an ability-to-repay assessment are provided to consumers with little or no credit history: according to this commenter this is not analogous to covered loan users who typically have bad credit histories and significant indicia of an inability to pay.

With respect to the second factor, some commenters disagreed with the 2019 NPRM's preliminary determination that lenders do not take advantage of particular consumer vulnerabilities. Commenters stated that payday lenders may offer products to the general public on uniform terms, but consumers in financial distress frequent covered lenders, not the general public. Commenters also noted that the 2017 Final Rule specifically found that covered lenders target particular consumers through advertising and marketing.[323] Commenters also cited studies that they stated show higher densities of covered loan providers in rural communities and communities with high concentrations of low-income, minority, and elderly consumers.[324] Commenters suggested that veterans are particularly vulnerable to covered loans.[325]

---

[323] 82 FR 54472, 54562 n.506.

[324] *See* section VI of the Bates White Report; CRL, *Power Steering: Payday Lending Targeting Vulnerable Michigan Communities* (Aug. 2018), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-michigan-paydaylending-aug2018_0.pdf; CRL, *Perfect Storm: Payday Lenders Harm Florida Consumers Despite State Law* (Mar. 2016), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_perfect_storm_florida_mar2016_0.pdf; Fannie Mae Foundation, *Analysis of Alternative Financial Service Providers* (Feb. 2004); California Dep't of Bus. Oversight, *The Demographics of California Payday Lending: A Zip Code Analysis of Storefront Locations* (Dec. 2016), https://dbo.ca.gov/wp-content/uploads/sites/296/2019/02/The-Demographics-of-CA-Payday-Lending-A-Zip-Code-Analysis-of-Storefront-Locations.pdf.

[325] Ann Baddour *et al.*, *Thank You For Your Service: The Effects of Payday and Vehicle Title Loans on Texas Veterans* (Mar. 2019), https://www.texasappleseed.org/sites/default/files/ThankYouForYourService_March%202019_0.pdf (noting that Texas veterans are six times as likely as the general population to get caught in a payday or vehicle title loan.).

With respect to the third factor, some commenters offered few comments on whether inconsistencies between a company's business model and its marketing of a product or service are pertinent. An academic commenter stated that consumers expect a lender to conduct underwriting and a lender's failure to do so can lull a consumer into thinking that they can repay the loan according to its original terms. Another commenter stated that the finding that lenders take unreasonable advantage of consumers does not depend on their understanding this disconnect—it only requires that the mismatch exist and that lenders take advantage of consumer's lack of understanding that many consumers are unable to repay their loan.

With respect to the fourth factor and whether a lender's decision not to offer feasible conditions to reduce harm has significant probative value toward finding unreasonable advantage-taking, one commenter stated that the 2019 NPRM did not cite examples of State laws that would constrain lenders from amortizing loans or offering longer terms. Another commenter also noted the 2019 NPRM's determination that amortizing products would require lenders to assume more credit risk is merely another way of pointing out that covered lenders shift a disproportionate share of credit risk onto borrowers.

Final Rule

After reviewing the comments received, the Bureau concludes that the practice of making covered short-term loans without reasonably assessing the borrower's ability to repay the loan according to its terms does not take unreasonable advantage of consumers for purposes of section 1031(d)(2) of the Dodd-Frank Act.

As a preliminary matter, the Bureau declines to use this rulemaking to articulate general standards addressing whether the conduct of lenders or other financial services providers take unreasonable advantage of consumers. Instead, the Bureau will articulate and apply such standards, including the 2017 Final Rule's four-factor analysis, to the extent necessary to decide the specific issue in this rulemaking, namely, whether lenders take unreasonable advantage of consumers if the lenders make covered loans without determining whether borrowers have the ability to repay them. Further, some comments suggested that lenders could never take unreasonable advantage of consumers by providing covered loans because millions of consumers take out such loans and a majority of State legislatures permit lenders to make such loans to their citizens. However, the Bureau does not find this general argument persuasive, because it addresses the product rather than the practice and because FTC precedent suggests that an act or practice can be an unfair, deceptive, or abusive even if it is prevalent in the marketplace.[326]

Turning to the four-factor analysis the 2017 Final Rule applied in concluding that lenders take unreasonable advantage of consumers through making loans without determining if they have the ability to repay them, the Bureau focuses first on whether payday loan borrowers were particularly vulnerable to being taken advantage of by payday lenders. The Bureau concludes that record does not support the conclusion that payday borrowers had any particular vulnerability or that payday lenders took unreasonable advantage of that particular vulnerability.

First, in the 2017 Final Rule, the Bureau noted that its "primary concern is for those longer-term borrowers who find themselves in extended loan sequences."[327] The Bureau, however, did not indicate what characteristic of these borrowers made them more vulnerable to the conduct of payday lenders than other payday loan borrowers. FTC precedent has analyzed whether consumers are particularly vulnerable to the acts and practices because the consumers are part of a group that would respond differently to conduct than the general population, such as

---

[326] *See, e.g.*, *AFSA*, 767 F.2d at 976-77 (contract provisions were found to be unfair even though they were industry-wide boilerplate).

[327] *Id.*

cancer patients having a different take away than the general population from cancer cure advertising claims for a product or children having a different take away than adults from advertising claims for products.[328]

Assuming for the sake of the argument that there are payday loan borrowers who lenders can take unreasonable advantage of because of a particular vulnerability, in practice the 2017 Final Rule applied to all consumers (*i.e.*, up to 12 million consumers annually) who take out payday loans, not just borrowers who find themselves in extended loan sequences. Indeed, the 2017 Final Rule's analysis and provisions apply to all payday loan consumers, even consumers who successfully repaid their loans without reborrowing—a group of consumers that the Bureau itself in the 2017 Final Rule acknowledged benefitted from payday loans.

In the 2017 Final Rule, the Bureau reasoned that lenders took unreasonable advantage of payday loan borrowers by targeting prospective borrowers through advertising, marketing, or store placement. The Bureau emphasizes that businesses engaging in efforts to identify and persuade prospective customers to purchase their products is very common commercial conduct. Indeed, such efforts often are an important form of competition among firms that results in lower prices and innovation. The Bureau declines to conclude that the mere fact the payday lenders advertised, marketed, selected store placement, or otherwise generally promoted their loans to consumers who may be interested in them indicates that the lenders were using such conduct to take unreasonable advantage of consumers. Moreover, even if the Bureau were to consider longer-term borrowers with extended sequences to be particularly vulnerable to being taken

---

[328] *See, e.g.*, FTC Unfairness Policy Statement, *Int'l Harvester*, 104 F.T.C. at 1074 (unfair practices may include exercising "undue influence over highly susceptible classes of purchasers, as by promoting fraudulent 'cures' to seriously ill cancer patients"); *Ideal Toy*, 64 F.T.C. at 310 ("False, misleading and deceptive advertising claims beamed at children tend to exploit unfairly a consumer group unqualified by age or experience to anticipate or appreciate the possibility that representations may be exaggerated or untrue.").

advantage of, in the 2017 Final Rule the Bureau did not find that payday lenders targeted their loans to these borrowers. In fact, payday lenders do not know which prospective borrowers will become longer-term borrowers with extended sequences at the time that lenders are advertising, marketing, placing, or otherwise promoting initial payday loans to prospective customers.

Finally, even assuming payday loan borrowers who are longer-term borrowers with extended sequences are particularly vulnerable and that payday lenders had a vehicle through which they could take unreasonable advantage of those vulnerabilities, there is no evidence in the 2017 Final Rule that supports the conclusion that lenders do so. Even commenters who did not support the 2019 NPRM acknowledged that covered lenders offer loans on uniform terms to the general public and treat consumers substantially the same. Lenders do not increase prices or offer unfavorable changes to contract terms to those consumers who reborrow extensively. Thus, the Bureau concludes that the information in the record does not support the conclusion that payday lenders take advantage of particular consumer vulnerabilities if they make loans to consumers without determining if they have the ability to repay them.

The Bureau in the 2017 Final Rule also determined that lenders making payday loans without determining if borrowers had the ability to repay was an atypical lending practice in the broader marketplace, and that this was a factor indicating that lenders were taking unreasonable advantage of consumers through not making this determination. At the outset, the Bureau notes that whatever analysis covered lenders conduct as to their likely return before making payday loans, most covered lenders do not assess ability to repay similar to what the 2017 Final Rule would require.[329] But the Bureau disputes the characterization of this practice of not assessing

[329] The Bureau acknowledges that the Community Financial Services of America, a trade association representing payday and small-dollar lenders, revised its best practices to add that its members should, before extending credit,

ability to repay as atypical among markets for consumer financial products and services. In light of some comments, the Bureau believes that the 2019 NPRM may have overstated the extent to which providers of particular consumer financial products extend credit without assessing ability to repay. Some of the consumer financial products that the 2019 NPRM cited for not assessing ability to repay may incorporate ability-to-repay assessments, including private student loans, secured credit cards, and reverse mortgages. However, the examples of particular consumer financial products set out in the 2019 NPRM were illustrative. There are other alternative products that do not require an ability-to-repay assessment, such as long-term installment loans, as set out in the 2016 NPRM.[330]

Assuming for the sake of the argument that lenders making payday loans without determining that consumers have the ability to repay them is an atypical lending practice, it does not follow that lenders are taking unreasonable advantage of consumers through this different lending practice. Neither the 2017 Final Rule nor commenters have explained why the atypicality of this practice shows that lenders use it to take unreasonable advantage of consumers. A commenter argued that atypicality is relevant because if a lender's practice is unusual, then consumers may not expect the lender to engage in it, which, in turn, could permit the lender to take unreasonable advantage of them. But even if it was atypical in the experience of consumers with other financial products for lenders not to make an ability-to-repay determination before extending credit, millions of consumers take out payday loans without

---

"undertake a reasonable, good-faith effort to determine a customer's creditworthiness and ability to repay the loan." This practice applies to other small-dollar loans the member makes. *See* Cmty. Fin. Servs. of Am., *Best Practices for the Small-Dollar Loan Industry*, https://www.cfsaa.com/files/files/CFSA-BestPractices.pdf (last visited Apr. 28, 2020). However, this best practice is not detailed or prescriptive and "reasonable" and "good faith" are not defined.

[330] 81 FR 47863, 47886 ("The Bureau believes based on market outreach, that some lenders use similar underwriting practices for both single-payment and payday installment loans (borrower identification, and information about income and a bank account) so long as they have access to the borrower's bank account for repayment.").

providing lenders with the information or the access to information that lenders would need to make traditional credit underwriting decisions. The 2017 Final Rule offered no evidence that consumers erroneously thought that payday lenders were making such an ability-to-repay determination when they in fact were not. So, even if payday lenders not conducting an ability-to-repay analysis was atypical (which the Bureau does not determine is the case), there is no evidence to support the conclusion that lenders used that atypicality to take unreasonable advantage of consumers.

The Bureau emphasizes that an especially careful and close analysis is needed before concluding that the acts and practices of firms take unreasonable advantage of and abuse consumers simply because those acts and practices are atypical. As the 2019 NPRM explained, innovators and new entrants into product markets (for instance, in this context, providers of wage access and fintech products) often engage in acts and practices that deviate from established industry norms and conventions. Such atypical acts and practices can be beneficial to consumers and they can be an important form of competition among firms, which, in turn, may also benefit consumers.

The 2017 Final Rule further concluded that the differences between how payday lenders marketed their loans and their business model shows that payday lenders took unreasonable advantage of consumers. The Bureau received few comments that addressed this factor, but those which did primarily focused on the potential for consumer misunderstanding, arising in large part from lender advertising and marketing, that would allow payday lenders to take unreasonable advantage of them. However, this is not a concern resulting from a mismatch between payday lending marketing and the payday lending business model. Because there does not seem to be a viable theory linking this mismatch to payday lenders taking unreasonable advantage of consumers, much less evidence that the lenders are actually doing so, the Bureau concludes that the record does not support the 2017 Final Rule's conclusion that this factor indicates that payday lenders took unreasonable advantage of consumers through making loans to consumers without determining their ability to repay those loans.

Finally, the 2019 NPRM preliminarily determined that, in contrast to the 2017 Final Rule, a payday lender's decision not to offer conditions that would eliminate or sharply limit feasible conditions that would reduce harm for a substantial portion of consumers is not of significant probative value concerning whether the identified practice constitutes unreasonable advantage-taking.[331] Several commenters noted that the 2019 NPRM did not cite examples of State laws that prevent lenders from offering products with features, such as longer loan terms or amortization options, that would reduce potential harm related to reborrowing and default. The Bureau is persuaded by these comments and the real-world examples of lenders shifting to alternative loan products (discussed above in the reasonable avoidability section) and concludes that the majority of State laws may not constrain covered lenders from designing covered loan products that would incorporate such features.

However, the Bureau determines that a decision not to offer products with such features may be reasonable given business considerations, including a lender's desire not to assume credit risk over a longer period of time. The 2017 Final Rule did not suggest that the identified practice interfered with consumers taking steps on their own to reduce or mitigate harm. Virtually every credit product presents some risks to consumers that could potentially be limited, although doing so likely would come at the cost of the lender's profits and potentially its viability as an ongoing

[331] The 2019 NPRM offered a lender's decision to offer longer-term, amortizing products as an example of a condition that would eliminate or reduce harm for a substantial population of consumers. *See* 84 FR 4252, 4276.

concern. If it were the case that lenders in a systematic fashion offered an inferior, "risky" product to one group of consumers and a superior, "safe" product to another, this could indicate that lenders were taking advantage of some consumers through the offering of that risky product. But there is no evidence that payday lenders are engaged in such conduct.

Accordingly, the Bureau finalizes the 2019 NPRM and concludes based on an application of the factual cirumstances cited in the 2017 Final Rule that payday lenders do not take unreasonable advantage of consumers through engaging in the identified practice.

b. Consumer Lack of Understanding of Material Risks, Costs and Conditions

(1) Legal

The Bureau's Proposal

Under section 1031(d)(2)(A) of the Dodd-Frank Act it is an abusive practice to take unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, or conditions of a consumer financial product or service. In the Mandatory Underwriting Provisions of the 2017 Final Rule, the Bureau took a similar approach to interpreting this provision as it took with respect to the reasonable avoidability element of unfairness. The Bureau in the 2017 Final Rule interpreted this statutory language to mean that consumers lack understanding if they fail to understand either their personal "likelihood of being exposed to the risks" of the product or service in question or "the severity of the kinds of costs and harms that may occur."[332]

The 2019 NPRM stated that, unlike the elements of unfairness specified in section 1031(c) of the Dodd-Frank Act, the elements of abusiveness do not have a long history or governing precedents. Rather, the Dodd-Frank Act marked the first time that Congress defined

[332] 82 FR 54472, 54617.

"abusive acts or practices" as generally unlawful in the consumer financial services sphere. The Bureau preliminarily determined in the 2019 NPRM that this element of the abusiveness test should be treated as similar to reasonable avoidability. That is, the Bureau preliminarily determined that the approach taken in the 2017 Final Rule was problematic. As discussed below, in the 2019 NPRM the Bureau applied an approach under which "lack of understanding" would not require payday borrowers to have a specific understanding of their personal risks such that they can accurately predict how long they will be in debt after taking out a covered short-term or longer-term balloon-payment loan. Rather, the Bureau preliminarily believed that consumers have a sufficient understanding under section 1031(d)(2)(A) of the Dodd-Frank Act if they understand the magnitude and likelihood of risk of harm associated with covered loans sufficient for them to anticipate that harm and understand the necessity of taking reasonable steps to prevent resulting injury. The Bureau in the 2017 Final Rule did not offer evidence that consumers lack such an understanding with respect to the material risks, costs or conditions on covered short-term and longer-term balloon-payment loans. In the absence of such evidence, the Bureau preliminarily determined it should not have concluded in the 2017 Final Rule that the identified practice was an abusive act or practice pursuant to section 1031(d)(2)(A) of the Dodd-Frank Act.

For these reasons, which are set forth in more detail in part V.B.1 above regarding reasonable avoidability, the Bureau preliminarily determined in the 2019 NPRM that its interpretation of "lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service" in the 2017 Final Rule was too broad. The Bureau sought comment on how the Bureau should interpret section 1031(d)(2)(A) of the Dodd-Frank Act.

Comments Received

Some commenters stated that the 2019 NPRM properly links the "lack of understanding" analysis pursuant to section 1031(d)(2)(A) of the Dodd-Frank Act with whether a consumer's injury is reasonably avoidable. At least one commenter stated that consumer "understanding" in this context has long been understood to mean a general awareness of possible outcomes and that the 2019 NPRM correctly determined that section 1031(d)(2)(A) does not require payday borrowers to accurately predict how long they individually will be in debt after taking out a loan. Commenters also stated that the 2017 Final Rule's interpretation of this element was inconsistent with the statutory language, which focuses on "understanding" the risks and costs of "the product," not on predictions about the consequences of an individual consumer's use of it.

Trade association commenters stated that the plain text of the Dodd-Frank Act and its supplemental history, including legislative history, indicate that the abusiveness standard as set forth in section 1031 is intended to be viewed on an individual, case-by-case basis.

In contrast, other commenters, including consumer groups, disagreed with the proposal, stating that the 2017 Final Rule applied an appropriate standard for section 1031(d)(2)(A) of the Dodd Frank Act and correctly determined that a significant population of consumers do not understand the material risks and costs of unaffordable loans that are made without reasonably assessing the borrower's ability to repay the loan according to its terms. Commenters also cited behavioral economics factors and other research to suggest that consumers do not understand covered loan costs and terms.[333]

[333] *See* section VI of Bates White Economic Consulting, *Report Reviewing Research on Payday, Vehicle Title, and High-Cost Installment Loans* (May 2019), *https://lawyerscommittee.org/wp-content/uploads/2019/05/Report-reviewing-research-on-payday-vehicle-title-and-high-cost-installment-loans.pdf* (providing an overview of studies addressing consumer understanding); *see also* Martin study.

Some consumer groups and a group of 25 State attorneys general argued that the 2019 NPRM erroneously conflated the unfairness and abusiveness standards by treating the lack of understanding analysis as similar to reasonable avoidability. Some commenters asserted that the statutory standard requires understanding of "material risks, costs, or condition" of a product—not the knowledge of lending generally.

Final Rule

After reviewing the comments received, while the statutory language for reasonable avoidability and lack of understanding is different, the Bureau determines that the lack of understanding element of abusiveness pursuant to section 1031(d)(2)(A) of the Dodd-Frank Act should be treated as similar to the requisite level of understanding for reasonable avoidability. For the same reasons that the Bureau concluded that there was an insufficient basis to support the 2017 Final Rule's finding that substantial injury from the identified practice was not reasonably avoidable, the Bureau now concludes that there is an insufficient basis to conclude that consumers lack understanding of the material risks, costs, or conditions of covered loans.

The Bureau declines to follow certain recommendations in comments suggesting that the statutory language of Dodd-Frank Act section 1031(d)(2)(A) requires merely a general awareness of possible outcomes.

In finalizing the 2019 NPRM's preliminary determination, the Bureau concludes that the 2017 Final Rule should have applied a different interpretation and incorrectly determined that consumers lack requisite understanding. As discussed in the reasonable avoidability section, the 2017 Final Rule did not offer specific evidence on what consumers specifically understand with respect to material risks, costs, or conditions of covered loans. Although the 2017 Final Rule concluded that a significant population of consumers do not understand the material risks and costs of covered loans, the 2017 Final Rule extrapolated or inferred this conclusion from the Bureau's interpretation of limited data from the Mann study, which examined the different question of whether consumers are unable to predict how long they would be in debt. The limited data from the Mann study does not address whether consumers lack an understanding of the material risks, costs, orconditions of covered loans. For instance, the 2017 Final Rule did not consider evidence that directly addressed whether consumers are aware of the particular risks flowing from extended loan sequences or understand that a significant portion of consumers end up in extended loan sequences. Commenters point to evidence that the Bureau had considered in the 2016 NPRM preceding the 2017 Final Rule, which suggests a lack of understanding about particular terms of covered loans—principally, the Martin study[334]—but this evidence has limitations as described below in part VI.C.2.b, and does not offer support for the 2017 Final Rule's findings as to consumer understanding of covered loan risks, costs, or conditions more broadly.

In addition, the Bureau disagrees with comments that the 2019 NPRM erroneously conflates unfairness and abusiveness in analyzing the "lack of understanding" element. Although the 2019 NPRM proposed to evaluate understanding in the unfairness and abusiveness analyses in a similar manner, reasonable avoidability has a "means to avoid" requirement that is absent from the abusiveness standard. Thus, in certain circumstances, abusiveness could prohibit some conduct that unfairness would permit. But in light of the Bureau's proposal, and an analysis of the comments received, the Bureau determines that it is appropriate to treat reasonable avoidability and "lack of understanding" as similar but distinct.

---

[334] *See* Martin, 52 Ariz. L. Rev. at 563.

Accordingly, the Bureau concludes that the 2017 Final Rule failed to show that consumers lack understanding of the material risks, costs, or conditions of the practice of making covered short-term loans without reasonably assessing the borrower's ability to repay the loan according to its terms.

(2) Reconsidering the Evidence for the Factual Analysis of Consumer Lack of Understanding in Light of the Impacts of the Mandatory Underwriting Provisions

In the 2019 NPRM, the Bureau preliminarily believed that the Mann study was not sufficiently robust and reliable, in light of the Rule's dramatic impacts in restricting consumer access to payday loans, to be the linchpin for a finding that consumers lack understanding of the material risks, costs, or conditions of such loans. The 2019 NPRM also proposed that other findings and evidence were not sufficiently robust and reliable to support the Bureau's finding in the 2017 Final Rule that consumers lacked an understanding of the possible risks and consequences associated with taking out payday loans.

The Bureau finds that the analysis of the factual underpinnings of consumer lack of understanding is the same as it is for the reasonable avoidability analysis. The same factual underpinnings supported, in the 2017 Final Rule, the finding that consumers lacked understanding for purposes of abusiveness and unfairness. Similarly, the 2019 NPRM addressed the same set of shared facts in reconsidering the 2017 Final Rule's analysis of lack of understanding and reasonable avoidability. The consideration of comments and additional analysis, addressed above in parts V.B.2.a through V.B.2.d, therefore apply equally here to the factual underpinnings of consumer lack of understanding.

For the reasons set out above in parts V.B.2.a through V.B.2.d and VI.C.1.b(1), the Bureau concludes that the available evidence does not provide a sufficiently robust and reliable basis to conclude that consumers who use covered short-term or longer-term balloon-payment loans lack understanding of the material risks, costs and conditions of payday loans.

2. Takes Unreasonable Advantage of Consumers' Inability to Protect Themselves

a. Takes Unreasonable Advantage

For the reasons set out above in part VI.C.1.a, the Bureau finalizes the 2019 NPRM and concludes that the factors cited in the 2017 Final Rule do not constitute unreasonable advantage-taking of consumers' inability to protect themselves. The Bureau withdraws its determination in the 2017 Final Rule that the four factors it identified—atypicality, taking advantage of particular vulnerabilities, reliance on a business model inconsistent with the manner in which the product is marketed to consumers, and limitations on means of reducing or mitigating harm for many consumers—constituted unreasonable advantage taking of consumers' inability to protect themselves, assumed for purposes of this analysis.

b. Consumers' Inability to Protect Themselves—Factual Reconsideration

(1) The Pew Study and the Finding Based on It

The Bureau's Proposal

In part V.B.3 of the 2019 NPRM, the Bureau preliminarily found that a survey of payday borrowers conducted by the Pew Charitable Trusts (Pew study)[335] does not provide a sufficiently robust and reliable basis for the Bureau's finding in the 2017 Final Rule that consumers who use covered short-term or longer-term balloon-payment loans lack the ability to protect themselves in selecting or using these products. In the study, 37 percent of borrowers answered in the

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

affirmative to the question "Have you ever felt you were in such a difficult situation that you would take [a payday loan] on pretty much any terms offered?"

The 2019 NPRM stated that the Pew study asked respondents about their feelings, not about their actions; and, that respondents were not asked whether they had in fact taken out a payday loan at a time when they would have done so on any terms. The 2019 NPRM also stated that the Pew study contains a number of other findings that cast doubt on whether payday borrowers cannot explore available alternatives that would protect their interests. For example, the Pew study found that 58 percent of respondents had trouble meeting their regular monthly bills half the time or more, suggesting that these borrowers are, in fact, accustomed to exploring alternatives to payday loans to deal with cash shortfalls.

The 2019 NPRM also cited to other evidence that it preliminarily determined casts doubt on the robustness and reliability of the Pew study.[336]

Comments Received

Industry commenters and others stated that the Pew study provided an inadequate basis for the 2017 Final Rule to have drawn broad conclusions about consumers' ability to protect their own interests. Industry commenters stated that the inverse of the Pew study's 37 percent is that 63 percent of consumers would seek alternatives if they perceived the payday loans as harmful. Industry commenters further stated that consumers generally act in a utility-enhancing way when opting for and using a payday loan. They also stated that payday loan consumers have numerous alternatives to obtain short-term financial assistance, including through check cashing and pawn broking as well as through loans from personal finance companies and financial institutions.

[336] 84 FR 4252, 4267-68.

Consumer group commenters and others noted that the Pew study was limited to payday loans borrowers. That sample set, they stated, indicates that respondents were speaking about actual payday loan experience. Moreover, in their view a reasonable reading of the study's survey question is that it asks for respondents to recall a situation in the past when they took out a payday loan. They stated that the 2019 NPRM provides no basis for assuming that respondents were not answering in the affirmative based on an actual experience with payday loans. Further, they stated, the survey responses about regular difficulty paying bills does not indicate that borrowers are accustomed to exploring alternatives. The more straightforward interpretation, they said, is that many payday borrowers often find themselves in situations where payday loans appear to be the only alternative.

Consumer group commenters stated that the other evidence cited by the 2019 NPRM as casting doubt on the Pew study was itself dubious or not applicable to payday borrowers. These commenters also sought to rebut the other evidence the 2019 NPRM cited. They argued that, even if its validity were accepted, in the view of these commenters this other evidence does not undermine the 2017 Final Rule's finding of consumer inability to protect interests.

Final Rule

For the reasons set out in the 2019 NPRM and reiterated here, the Bureau determines that the Pew study does not provide a sufficiently robust and reliable basis for the Bureau's finding in the 2017 Final Rule that consumers who use covered short-term or longer-term balloon-payment loans lack the ability to protect themselves in selecting or using these products. Consumer group commenters' observations—that the Pew study surveyed actual payday loan borrowers and that those surveyed could have understood the question to be asking about their actual payday loan experience—do not change the fact, as preliminarily set forth in the 2019 NPRM, that the question posed was not the question directly relevant to the issue at hand (whether consumers take out payday loans because they have no alternative). The question asked was hypothetical ("would you have" taken out a loan on any terms offered) and did not ask directly about the actual experience of those surveyed. Further, the Bureau concludes, as was stated in the 2019 NPRM, that the Pew study does not establish—whether robustly or otherwise—that consumers lack access to alternative sources of credit before consumers take out the first loan in a sequence of payday loans. Indeed, the Bureau concludes that payday loan consumers do have access to alternative sources of credit. As noted above, consumers who live in States where covered loans are restricted are able to find credit alternatives without turning to illegal loans or harmful alternatives. Newly available alternatives include credit offered by fintechs, credit unions, and other mainstream financial institutions. Further, as was stated in the 2019 NPRM,[337] in a report issued by the Federal Reserve Board regarding the economic well-being of U.S. households, consumers who reported that they would have difficulty covering a $400 emergency expense were asked how they would cope were such an emergency to arise. These consumers pointed to a variety of potential mechanisms including borrowing from a friend or family member (26 percent) or selling something (19 percent). Only 5 percent reported that they would use a payday loan or similar product.[338]

Finally, regarding consumer group commenters' criticisms of the other evidence cited by the 2019 NPRM as casting doubt on the Pew study, the 2019 NPRM cited this evidence merely to corroborate the Bureau's concerns about the Pew study. The Bureau's determination that the Pew study does not provide a sufficiently robust and reliable basis for the 2017 Final Rule's

[337] 84 FR 4252, 4267.

[338] Bd. of Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S Households in 2017*, at 21 (2018), *https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf*.

finding that payday loan consumers lack the ability to protect themselves is not dependent upon the other evidence cited by the 2019 NPRM.

(2) Other Evidence Pertaining to Inability to Protect

The Bureau's Proposal

In part V.B.4 of the 2019 NPRM, the Bureau preliminarily found that the evidence other than the Pew study cited by the 2017 Final Rule for consumer inability to protect interests was insufficient to sustain a determination that consumers are not able to protect their own interests. That is, the Bureau preliminarily found that the evidence other than the Pew study cited by the 2017 Final Rule for consumer inability to protect interests did not suffice to compensate for the insufficient robustness and reliability of the Pew study.

Comments Received

Industry commenters and others stated that many of the studies, other than the Pew study, cited by the 2017 Final Rule did not support the Rule or, even if in part supportive of aspects of the Rule (*e.g.*, substantial injury), the studies also contained other relevant findings that suggest that payday loan consumers are able to protect their interests. They also stated that payday loan consumers have alternatives to payday loans, with which payday loans compete, and that the availability of these alternatives suggests that consumers are able to protect themselves in selecting and using payday loans. They also stated that there is no evidence of market failure in the competition among these various alternative forms of credit, including payday loans, for the business of consumers.

In addition, these commenters noted, the rate of consumer complaints about payday loans is low relative to other consumer financial products, which indicates that consumers do not see themselves as being harmed by the products. Further, of the payday loan complaints that are submitted, according to commenters, many are about unregulated offshore lenders and illegal operators, and others do not actually relate to payday lenders but are in fact about debt collection or other issues. Finally, these commenters noted, the Bureau has acknowledged that consumer complaints related to payday loans have been declining for the past several years.

Consumer group commenters and others stated that there was a substantial amount of robust and reliable evidence, other than the Pew study, that the 2017 Final Rule pointed to as showing consumer inability to protect interests. And, they said, the 2019 NPRM did not address or consider this evidence. Specifically, the evidence in the 2017 Final Rule record that consumer group commenters asserted that the 2019 NPRM did not address, and which they said robustly shows consumer inability to protect interests, is the same evidence listed above in part V.C.4 of the 2019 NPRM (and numbered (1) to (5)) regarding whether consumer injury is not reasonably avoidable due to consumers' lack of specific understanding of their personal risks.

Since publication of the NPRM in February 2019, two relevant studies have become available: the Carvalho study and the Allcott study, which are described in part V.B.2 above.

Final Rule

The Bureau has considered all of the applicable evidence, including all of the evidence raised by commenters. For the following reasons, the Bureau determines that the evidence does not provide a sufficiently robust and reliable basis to conclude that consumers who use covered short-term or longer-term balloon-payment loans are unable to protect their interests in selecting or using the loans.

Evidence of Repeated Reborrowing Prior to Default

With respect to the evidence showing that substantial numbers of payday loan consumers reborrow repeatedly prior to defaulting on their loans, the Bureau determines that that evidence does not suggest—whether robustly and reliably or otherwise—that consumers are unable to protect themselves before they take out the first loan in a sequence. The evidence of reborrowing prior to default does not, for example, suggest that consumers have inadequate information about or do not have alternatives to payday loans. Further, as noted above, the Bureau does not believe that whenever a consumer makes a choice that turns out to have been suboptimal it follows that the consumer lacked understanding, or was unable to protect his or her interests, at the time the choice was made. Consumers often make decisions in conditions of uncertainty—uncertainty of which the consumers are aware—and those decisions sometimes turn out to be suboptimal, but it does not follow that the consumers at the time of their decisions were unable to protect their own interests.

Analyzing that same evidence of repeated reborrowing prior to default, consumer group commenters argued, as noted above, that the 2019 NPRM ignored the 2017 Final Rule's point that the evidence shows that consumers cannot protect themselves *after* they have taken out the first loan in a sequence. However, the requirement in the 2017 Final Rule that lenders assess consumers' ability to repay applies to *all* consumers of payday loans, not just those consumers who are already engaged in a sequence of short-term payday loans. That is, the 2017 Final Rule's requirement to assess consumers' ability to repay applies to all consumers who take out a payday loan and it applies before a consumer takes out the first loan in a sequence. The Bureau further responds that the focus of Dodd-Frank Act section 1031(d)(2)(B) is on whether consumers are unable to protect their own interests. In the context of the 2017 Final Rule's finding that the practice of failing to assess ability to repay takes unreasonable advantage of consumers who take out covered loans, if the consumers can protect their interests before they take out the first loan in a sequence of covered loans, they do not lack the ability to protect their own interests. In other words, because the 2017 Final Rule's requirement to assess consumers' ability to repay applies before a consumer takes out the first loan in a sequence, the Bureau determines that the Bureau must find that consumers are unable to protect themselves *both* (i) before they take out the first loan in a sequence *and* (ii) after they take out the first loan, in order for the Bureau to find that the practice of making a payday loan without assessing ability to repay takes unreasonable advantage of consumers' inability to protect themselves (pursuant to Dodd-Frank Act section 1031(d)(2)(B)).[339] And, as stated above, the Bureau has determined that the evidence indicating that consumers reborrow repeatedly prior to defaulting does not suggest, whether robustly and reliably or otherwise, that consumers are unable to protect themselves *before* they take out the first loan. The Bureau therefore determines that that evidence does not suggest that consumers are unable to protect themselves in selecting or using payday loans.

Evidence of Harmed Consumers Initiating Payday-Loan Sequences Recurringly

Regarding the evidence that consumer group commenters asserted shows that some consumers harmed by payday loans enter into loan sequences recurringly, the Bureau determines that that evidence does not indicate that consumers do not have alternatives to payday loans, nor that consumers are unable to protect themselves before they take out the first loan in a sequence. The evidence does not suggest that consumers have inadequate information about or do not have alternatives to payday loans. Indeed, the Bureau determines that the evidence is reasonably viewed as indicating that the consumers, making their own choices, have decided that payday loans are the best option among the alternatives available to them. That is, this evidence does

[339] The 2017 Final Rule, 82 FR 54472, 54619-21, explained its view that consumers can protect their interests neither before they take out the initial payday loan nor after. This is because it was necessary for the 2017 Final Rule to show that there was no time when consumers could protect their interests. That is, because the 2017 Final Rule's ability-to-repay requirement applies before a consumer takes out the first loan in a sequence, if the consumer were able to protect his or her interests before she takes out the initial payday loan, there would be no "inability to protect," even if the consumer has less ability or even no ability to protect their interests afterward.

not suggest that consumers are unable to decide for themselves among the options available to them. The evidence therefore does not suggest that consumers are unable to protect their own interests.

Other Studies Mentioned by the 2017 Final Rule

In addition, the Bureau has determined that the other studies—*e.g.*, the "150 studies" pointed to by consumer group commenters—mentioned by the 2017 Final Rule are not relevant to the specific issue at hand here. Instead of considering the number of studies that may be relevant to an issue, the Bureau considers the relevance, rigor, and consistency of findings across studies in determining the probative value of research on that issue. The large set of studies discussed in the 2017 Final Rule concerned the experiences of low-income consumers, State reports on payday and vehicle-title lending, and responses to changes in State regulations for small-dollar lending, all of which provide useful context and evidence on how the market functions and how consumers engage with these products. But these studies do not constitute robust and reliable evidence regarding the specific factual finding the Bureau would have to make to conclude that the identified practice was abusive, namely, that consumers are unable to protect their interests before they take out a payday loan.

Other Miscellaneous Sources of Evidence Cited by Commenters

The other miscellaneous evidence pointed to by consumer group commenters (see part VI.C.2.b(2) above) does not robustly and reliably indicate that consumers are unable to protect their own interests in selecting or using payday loans. Some of these sources of information were cited by the 2017 Final Rule for various purposes, but they were not the basis for the 2017 Final Rule's determination that consumers are unable to protect their own interests. This is because these sources are even less probative of this issue than the Pew study that the Bureau focused on in the 2017 Final Rule.

The Martin Study

The Bureau did not rely on the Martin study in the 2017 Final Rule and does not rely upon it in this rulemaking. The Bureau does not believe that commenters' arguments regarding the Martin study suggest that consumers are unable to protect their own interests in selecting or using payday loans.

The Martin study reported that 60 percent of payday loan borrowers did not know the APR of their loans. Even were the Bureau to grant that this study suggests that some consumers might not know the exact price of their payday loans (*i.e.*, in APR terms), the Bureau believes that such lack of knowledge does not indicate that consumers are unable to protect their interests before they take out a payday loan. A consumer can have access to other alternative sources of credit, and be familiar with payday loans and understand that they are a relatively expensive source of credit,[340] even if the consumer does not know the APR of a payday loan. For example, the consumer might have prior experience using payday loans or might have family, friends, or neighbors who have used payday loans and other forms of credit and from whom the consumer might have developed a reasonable sense of how payday loans compare to other forms of credit, even if the consumer does not know the specific APR of the payday loan the consumer received. The Bureau therefore determines that the Martin study does not show that consumers are unable to protect their interests in selecting or using payday loans.

---

[340] As noted above, evidence is mixed as to whether consumers understand the price of their loans in dollar-cost terms (*e.g.*, $15 for $100 for 2 weeks), even if they might not remember or understand the loans' APR. For example, the Elliehausen study, at 36-37, found that most payday loan consumers said they were aware of the finance charge of their payday loans and noted most borrowers reported what the study considered plausible finance charges for their loans.

Evidence Available Subsequent to Publication of the 2019 NPRM

Finally, the Bureau turns to the two studies—the Carvalho study and the Allcott study—that became available since publication of the 2019 NPRM. The Bureau is not relying upon these studies in this rulemaking because they do not show that consumers are unable to protect their own interests in selecting or using payday loans.

The Carvalho study, as noted above, pertained to Icelandic consumers and found that about half of payday loan dollars go to consumers in the bottom 20 percent of decision-making ability. The data from the study primarily concerns Icelandic consumers, which makes its usefulness unclear when considering a regulatory intervention for payday loan borrowers in the United States. In any event, the Bureau concludes that this study does not demonstrate, let alone robustly and reliably demonstrate, that payday loan consumers are unable to protect their own interests in selecting or using payday loans. While consumers with low decision-making ability may have more difficulty than other consumers in selecting or using any credit, financial, or other product, these consumers (like all other consumers) choose among available credit and financial products as well as a myriad of other products. In other words, consumers being in the bottom 20 percent of the population in terms of decision-making ability does not necessarily mean they are incapable of protecting their own interests in financial transactions. Moreover, the 2017 Final Rule's identified practice and corresponding Rule provisions apply to all payday loan borrowers, not just those who are in the bottom 20 percent of the population in terms of decision-making ability. The Carvalho study does not suggest that the consumers in question do not have access to the same credit product alternatives to payday loans that are available to the general public. For all of the reasons discussed above, the Bureau is not relying on the Carvalho study to support conclusions in this rulemaking about inability to protect interests.

The Allcott study, as described above, finds that many payday loan borrowers have a desire to be incentivized not to take out the loans in the future. Most surveyed borrowers said they would "very much" like to give themselves extra motivation to avoid payday loan debt and a supermajority (about 90 percent) would at least somewhat like to give themselves extra motivation. The study finds that borrowers in their sample do put more weight on near-term payoffs, but that they are also aware of this. Moreover, the borrowers' self-control issues, if present, would likely be present irrespective of which credit or financial products they chose to use. That is, the study does not suggest that consumers have inadequate information about, or do not have alternatives to, payday loans. Indeed, the study would be entirely consistent with consumers making their own choices and deciding that payday loans are the best option among the alternatives available to them. The Bureau believes that this study does not indicate that consumers are unable to protect their own interests in selecting or using payday loans. As an additional reason, the study involves a single lender in a single State (Indiana). The Bureau therefore believes that the study is not sufficiently representative to serve as the basis for making findings applicable nationwide about all lenders making payday loans to borrowers in all States. For these reasons, the Bureau is not relying on the Allcott study to support any conclusions in this rulemaking about inability to protect interests.

For the reasons described above, the Bureau determines that the available evidence does not provide a sufficiently robust and reliable basis to conclude that consumers who use covered short-term or longer-term balloon-payment loans are unable to protect their interests in selecting or using the loans. Accordingly, the Bureau determines to revoke the 2017 Final Rule's finding that consumers are unable to protect themselves in selecting or using payday loans.

D. Conclusion on Abusiveness Theories

As set out in part VI.C above, the Bureau determines that there are insufficient factual and legal bases for the 2017 Final Rule to identify the practice as abusive. As to the lack of understanding theory of abusiveness, there are three discrete and independent grounds that justify revoking the identification of an abusive practice: (1) that there is no taking unreasonable advantage of consumers in that context; (2) that the 2017 Final Rule should have applied a different interpretation of the lack of understanding element of abusiveness under section 1031(d)(2)(A) of the Dodd-Frank Act; and (3) that the evidence was insufficiently robust and reliable in support of a factual determination that consumers lack understanding.

As to the inability to protect theory of abusiveness, there are two independent grounds that justify revoking the identification of an abusive practice: (1) that there is no unreasonable advantage-taking of consumers; and (2) there are insufficient legal or factual grounds to support the identification of consumer vulnerabilities, specifically a lack of understanding and an inability to protect consumer interests.

In the aggregate, the Bureau concludes that there are independent legal and factual conclusions sufficient to finalize revocation of the Bureau's identification of abusive practices under both the consumer lack of understanding and the consumer inability to protect theories.

VII. Consideration of Alternatives and Conclusion

A. Consideration of Alternatives

The Bureau generally considers alternatives in its rulemakings. Here, the context for the consideration of alternatives is that the Bureau, for the reasons set forth above, is revoking the Mandatory Underwriting Provisions of the 2017 Final Rule, which were based on the Bureau's discretionary authority, not a specific statutory directive.[341] The 2017 Final Rule would eliminate most covered short-term and longer-term balloon-payment loans.

The Bureau's Proposal

In part V.D of the 2019 NPRM, the Bureau set forth its preliminary consideration of alternatives. The Bureau stated that, in light of the fact that the Bureau is revoking the Mandatory Underwriting Provisions of the 2017 Final Rule, the Bureau does not believe that the alternative interventions to the Mandatory Underwriting Provisions considered in the 2017 Final Rule are viable alternatives to the Bureau's proposed revocation of the Mandatory Underwriting Provisions, because the Bureau is proposing to revoke the underlying findings concerning the existence of an unfair and abusive practice.[342] The Bureau stated that it also does not believe that the expenditure of substantial Bureau resources on the development of possible alternative theories of unfair or abusive practices and corollary preventative remedies is warranted given the likely complexity of such an endeavor. Additionally, the Bureau stated that it is not choosing to exercise its rulemaking discretion in order to pursue new mandated disclosure requirements pursuant to section 1032 of the Dodd-Frank Act.

In parts V.B.1 and V.B.3 of the 2019 NPRM, the Bureau stated its preliminary view that it cannot in a timely and cost-effective manner develop evidence that might corroborate the 2017 Final Rule's interpretation of the limited data from a portion of the Mann study and the results of the Pew study that the 2017 Final Rule relied on to support its key findings.

---

[341] 12 U.S.C. 5531(b) ("The Bureau *may* prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices.") (emphasis added).

[342] This includes, for instance, the payment-to-income alternative, limits on the number of loans in a sequence, the various State law regulatory approaches such as loan caps, and other interventions. *See* 82 FR 54472, 54636-40.

Comments Received

Consumer groups and others stated that one viable alternative would be for the Bureau to withdraw the 2019 NPRM, allow implementation of the 2017 Final Rule to proceed, and analyze the effects of the Mandatory Underwriting Provisions after implementation. Another alternative, they said, would be additional research, which would not be too complex or costly, because the Bureau has a Congressionally mandated Office of Research with extensive research capabilities, as well as a new office focused on cost-benefit analysis, and available budget authority that it is not using. Further, they said, timeliness is not a concern here, because there is no deadline or requirement for the Bureau to reconsider its own rule. Thus, they stated, the Bureau declining to conduct new research would appear to be nothing more than a pretext to justify its chosen result. Finally, consumer groups stated, a Bureau declination of conducting additional research in this area would conflict with the Bureau's stated commitment to encourage consumer savings and to ensure that the market for liquidity-bridge loan products is fair, because if such loan products are expensive, misleadingly offered, or difficult to use safely, it can be harder for consumers to build savings.

Industry commenters and others stated that the 2019 NPRM properly did not adopt any of the alternative approaches that it considered. These commenters stated that mandating new disclosures would change little. They also stated that the alternatives considered in the 2017 Final Rule rest on the same insufficient findings as the Mandatory Underwriting Provisions and it would not be a good use of the Bureau's limited resources to develop new evidence to support such alternatives; instead, those resources would be better spent on Office of Innovation initiatives. Some industry commenters noted that the 2017 Final Rule acknowledged that short-duration sequences of short-term payday loans can be welfare enhancing for consumers. And, they stated, to the extent any problem was identified by the 2017 Final Rule, it was short-term loan sequences of long duration. At least one industry commenter stated that the appropriate remedy for such harm if it exists would be to address loan sequence duration directly rather than apply Mandatory Underwriting Provisions to all covered loans at the time a consumer initially takes out a loan. This commenter stated that the mismatch between the injurious practice asserted by the Bureau and the Bureau's chosen remedy of the Mandatory Underwriting Provisions means that the 2017 Final Rule's Mandatory Underwriting Provisions are arbitrary and capricious.

One commenter that is one of the three nationwide credit bureaus stated that it sees its short-term lender customers using a combination of traditional and alternative credit data, and that traditional lenders also use traditional and alternative credit data. As a result, it said, the previously different underwriting policies and credit data requirements of short-term and traditional lenders are becoming quite similar. The commenter further stated that short-term lending appears to be undergoing a shift in the type of loans being requested by consumers and therefore provided by lenders. Specifically, the credit bureau stated, its data shows that the number of single-payment loans reported to it in 2018 grew 17 percent, while the number of short-term installment loans grew 82 percent. The commenter also cited to industry data showing that single-payment loans declined 4 percent in 2018 while installment loans grew by 18 percent. This commenter concluded that these market changes offer benefits to consumers and obviate the need for the specific underwriting requirements in the 2017 Final Rule.

Final Rule

For the reasons set forth above, the Bureau has determined that it should not have identified an unfair and abusive practice as set out in § 1041.4 of the 2017 Final Rule and the

Bureau has therefore determined to revoke § 1041.4 and its related provisions. Because the Bureau has determined that it should not have identified an unfair and abusive practice in § 1041.4, the Bureau determines that it would not be proper to allow implementation of the Mandatory Underwriting Provisions of the 2017 Final Rule to proceed.

Absent an identified unfair or abusive practice, the Bureau does not have the authority to implement alternatives to the 2017 Final Rule's Mandatory Underwriting Provisions that are based in the Bureau's UDAAP authority in section 1031 of the Dodd-Frank Act. Moreover, the Bureau is not exercising its discretion to undertake additional research in an attempt to support the unfairness and abusiveness identifications of the 2017 Final Rule, or to do so with respect to any of the alternatives based in the Bureau's UDAAP authority that the Bureau considered and dismissed in the course of issuing the 2017 Final Rule. The Bureau believes that innovation is occurring rapidly in the small-dollar lending market and that some lenders are underwriting small-dollar loans in new ways that better meet both lenders' and consumers' needs. These new methods do not appear to meet or be likely to meet the specific ability-to-repay requirements that were set forth in the Mandatory Underwriting Provisions of the 2017 Final Rule, and, therefore, consumers might not be able to choose these products if such requirements were applicable. But even independent of that consideration, the Bureau does not view as promising the prospect that additional Bureau research would seek to develop the necessary support for UDAAP findings such as that consumers lack the requisite understanding of the risk of substantial injury where they take out payday loans where lenders have not determined that they have the ability to repay them, that consumers are unable to protect their own interests before they take out payday loans, or that lenders' common business practices take unreasonable advantage of consumers.[343] Moreover, any Bureau research effort in this area pursuant to a possible UDAAP rulemaking would require significant resources and a substantial but uncertain amount of time. The Bureau has a busy rulemaking agenda with many other rulemakings that the Bureau views as more promising to prioritize in order to achieve the Bureau's mission of preventing consumer harm.[344] Finally, the Bureau does not believe it would be sensible to further delay the compliance date of the Mandatory Underwriting Provisions based solely on the uncertain prospect that additional Bureau research might develop further support for the unfairness and abusiveness identifications in the 2017 Final Rule.

On the other hand, the Bureau believes that disclosures constitute a more promising avenue for research. This research would not be focused on developing mandated disclosures under section 1031 of the Dodd-Frank Act to prevent UDAAPs, but rather would be focused on developing potential disclosures under section 1032 of the Dodd-Frank Act to provide consumers with information to help them understand better certain features of payday loans. The Bureau believes that payday loans can provide benefits to certain consumers. At the same time, the Bureau believes that improved disclosures could be helpful to consumers and therefore expects to consider them further. The Bureau views disclosures as a more promising investment of resources than the other alternatives discussed above, for the following reasons.

---

[343] Consumer protection issues have arisen and will continue to arise in the payday market, as in other markets, as a result of a given lender's specific practices, and the Bureau is prepared to address those issues (for example, through supervision and enforcement against deceptive claims in advertising or marketing for payday loans).

[344] *E.g.*, Semiannual Regulatory Agenda, 84 FR 71231 (Dec. 26, 2019). With respect to comments on the Bureau's general budget, the Bureau notes that it exercises its discretion to make budgetary decisions based on policy considerations that are well beyond the scope of this rulemaking.

There have been two disclosure interventions in the payday loan market evaluated so far. The first was a randomized controlled trial testing three different disclosures in a short-run experiment across 11 States.[345] The three disclosures were presented on the envelope containing the borrower's loan proceeds and included information on either (a) the APR of payday loans and other products, (b) the dollar cost of charges on a payday loan and credit card for different lengths of time, or (c) the share of people who will borrow a payday loan for different sequence lengths. The authors found that the dollar cost disclosure reduced reborrowing by about 11 percent, while the APR disclosure had a more modest effect. The disclosure highlighting reborrowing length had an insignificant effect.

Following this study, in 2012 Texas began requiring a disclosure that incorporates elements of the study's dollar and APR disclosures in addition to other information for all payday and vehicle title loans. Bureau researchers examined the effects of this policy change and found a reduction in payday loan volume of 13 percent, similar to what was found in the aforementioned randomized controlled trial.[346]

The 2019 NPRM noted that the Texas disclosures discussed above had "limited" effects and suggested this might be because payday loan users were already aware that such loans can result in extended loan sequences. However, as noted above, the reduction in payday loan borrowing was 11 to 13 percent, which suggests that a non-trivial share of consumers in the

---

[345] Marianne Bertrand & Adair Morse, *Information Disclosure, Cognitive Biases and Payday Borrowing*, 66 J. of Fin. 1865, 1865-93 (Dec. 2011) (Bertrand & Morse).

[346] Bureau of Consumer Fin. Prot., *Supplemental Findings on Payday, Payday Installment, and Vehicle Title Loans, and Deposit Advance Products* (June 2016), *https://files.consumerfinance.gov/f/documents/Supplemental_Report_060116.pdf*.

payday market may have responded to the additional information and/or to changes in how the information is presented by changing their borrowing behavior.[347]

The Bureau believes that the existing research in this area is promising but sparse. The Bureau will soon begin conducting research to better understand what information about payday loans consumers want to know as well as how consumers process, comprehend, and use that information in their decisions about payday loan use. In designing and testing disclosure forms, Bureau researchers plan to consider existing but limited research on payday disclosures, States' experiences in this market, Bureau researchers' subject-matter expertise, and the information and views consumers, consumer advocates, industry participants, and other stakeholders have shared with the Bureau. Measurable data from Bureau disclosure research will enable the Bureau to make stronger and more reliable inferences about the potential impact of model disclosures on the payday loan market than is possible with current data.

B. Conclusion

The Bureau believes that each of the concerns raised and finalized above are sufficiently serious in their own right to merit reconsideration of the 2017 Final Rule, and even more so when considered in combination. The Bureau now concludes that the 2017 Final Rule should have used an alternate approach in applying section 1031 of the Dodd-Frank Act in determining what kind of consumer understanding is necessary to make the findings on reasonable avoidability and lack of understanding required to support a determination that the identified practice was unfair or abusive; and in evaluating whether the factors set forth in the 2017 Final Rule are the appropriate standard for taking unreasonable advantage of consumers and, if so,

[347] Bertrand & Morse also argue "it is important to cast the 11% reduction in borrowing in light of the low cost and benign nature of information disclosure, relative to other policy alternatives" and note that other interventions may have larger effects but may also negatively affect consumers who are not the intended target of those interventions. Bertrand & Morse at 1891.

whether the Bureau properly applied that standard. The Bureau also believes that the 2017 Final Rule provided an insufficient basis for finding that consumers cannot protect their interests. The Bureau concludes that it is appropriate to revoke § 1041.4 and that it is also appropriate to revoke the remainder of the Mandatory Underwriting Provisions of the 2017 Final Rule.

The technical aspects of this revocation and additional, more specific questions with regard to the specific amendments to the 2017 Final Rule are discussed in more detail in part VIII below.

VIII. Section-by-Section Analysis

As described in greater detail in parts V, VI and VII above, the Bureau is revoking §§ 1041.4 and 1041.5 and related provisions of the 2017 Final Rule, which respectively identify the failure to reasonably determine whether consumers have the ability to repay certain covered loans as an unfair and abusive practice and establish certain underwriting requirements to prevent that practice. The Bureau is also revoking certain derivative provisions that are premised on these two core sections, including a principal step-down exemption for certain loans in § 1041.6, two provisions (§§ 1041.10 and 1041.11) that facilitate lenders' ability to obtain certain information about consumers' past borrowing history from information systems that have registered with the Bureau, and certain recordkeeping requirements in § 1041.12. The Bureau concludes that, because §§ 1041.4 and 1041.5 are being revoked, these derivative provisions no longer serve the purposes for which they were included in the 2017 Final Rule and are now revoked as well.

This part VIII describes the particular modifications the Bureau is making in order to implement the revocation of these various Mandatory Underwriting Provisions. Specifically, as discussed in more detail below, the Bureau is removing in their entirety the regulatory text and associated commentary for subpart B of the Rule (§§ 1041.4 through 1041.6) and certain provisions of subpart D (§§ 1041.10 and 1041.11, and parts of § 1041.12). The Bureau is also amending other portions of regulatory text and commentary in the 2017 Final Rule that refer to the Mandatory Underwriting Provisions or the requirements therein.

As this part VIII is describing the specific modifications to regulatory text and commentary that the Bureau is making, it refers to "removing" text rather than "revoking" it, consistent with the language agencies use to instruct the Office of the *Federal Register* as to changes to be made in the *Code of Federal Regulations*.[348] In order to avoid confusion, the Bureau is not renumbering the sections or paragraphs that it is not removing; rather, the Bureau now marks the removed section and paragraph numbers as "[Reserved]" so that the remaining provisions will continue with the same numbering as they have currently.

Due to changes in requirements by the Office of the *Federal Register,* when amending commentary the Bureau is now required to reprint certain subsections being amended in their entirety rather than providing more targeted amendatory instructions. The sections of commentary included in this document show the language of those sections now that the Bureau is adopting its changes as proposed. The Bureau is releasing an unofficial, informal redline to assist industry and other stakeholders in reviewing the changes that it is making to the regulatory text and commentary of the 2017 Final Rule.[349]

The Bureau did not receive comments on these proposed modifications. The sections below describe the Bureau's final actions regarding these provisions.

---

[348] As noted previously, while most of the 2017 Final Rule has a compliance date of August 19, 2019, the Rule became effective on January 16, 2018.

[349] This redline can be found on the Bureau's regulatory implementation page for the Rule at https://www.consumerfinance.gov/policy-compliance/guidance/payday-lending-rule/. If any conflicts exist between the redline and the text of the 2017 Final Rule or this final rule revoking the Mandatory Underwriting Provisions, the documents published in the *Federal Register* are the controlling documents.

Subpart A—General

Section 1041.1 Authority and Purpose

1(b) Purpose

Section 1041.1 sets forth the Rule's authority and purpose. The Bureau is removing the last sentence of § 1041.1(b), which currently provides that part 1041 also prescribes processes and criteria for registration of information systems. The Bureau is making this change for consistency with the removal of §§ 1041.10 and 1041.11 discussed below.

Section 1041.2 Definitions

2(a) Definitions

2(a)(5) Consummation

Section 1041.2(a)(5) defines the term consummation. Comment (a)(5)-2 describes what types of loan modifications trigger underwriting requirements pursuant to § 1041.5. The Bureau is removing comment 2(a)(5)-1 for consistency with the removal of § 1041.5 discussed below.

2(a)(14) Loan Sequence or Sequence

Section 1041.2(a)(14) defines the terms loan sequence and sequence to mean a series of consecutive or concurrent covered short-term loans, or covered longer-term balloon loans, or a combination thereof, in which each of the loans (other than the first loan) is made during the period in which the consumer has a covered short-term or longer-term balloon-payment loan outstanding and for 30 days thereafter. These terms are used in §§ 1041.5, 1041.6, and 1041.12(b)(3), and related commentary. The Bureau is removing and reserving § 1041.2(a)(14) for consistency with the removal of the provisions in which these terms appear, as discussed below.

2(a)(19) Vehicle Security

Section 1041.2(a)(19) defines the term vehicle security to generally mean an interest in a consumer's motor vehicle obtained by the lender or service provider as a condition of the credit. This term is used in §§ 1041.6 and 1041.12(b)(3) and in commentary accompanying §§ 1041.5(a)(8) and 1041.6. The Bureau is removing and reserving § 1041.2(a)(19) for consistency with the removal of the provisions in which this term appears, as discussed below.

The Bureau requested comment on whether there are any other definitional terms or portions thereof, in addition to the terms loan sequence or sequence and vehicle security, that it should similarly remove for consistency with the proposed revocation of the Mandatory Underwriting Provisions. The Bureau received no such comments and finalizes this provision as proposed.

Section 1041.3 Scope of Coverage; Exclusions; Exemptions

3(e) Alternative Loan

Section 1041.3(e) provides a conditional exemption for alternative loans from the requirements of 12 CFR part 1041, which are covered loans that satisfy the conditions and requirements set forth in § 1041.3(e). The Bureau is revising two comments accompanying § 1041.3(e) that reference the Mandatory Underwriting Provisions, as described below.

3(e)(2) Borrowing History Condition

Section 1041.3(e)(2) addresses a consumer's borrowing history on other alternative loans. Comment 3(e)(2)-1 describes the relevant records a lender may use to determine that the consumer's borrowing history on alternative covered loans meets the criteria set forth in § 1041.3(e)(2). The Bureau is revising the second sentence of this comment to remove language that refers to consumer reports obtained from information systems registered with the Bureau. The Bureau is changing this for consistency with the removal of § 1041.11 discussed below.

3(e)(3) Income Documentation Condition

Section 1041.3(e)(3) requires a lender to maintain and comply with policies and procedures for documenting proof of recurring income. Comment 3(e)(3)-1 generally describes the income documentation policies and procedures that a lender must maintain to satisfy the income documentation condition of the conditional exemption. The Bureau is removing the second sentence of the comment, which distinguishes the income document condition of § 1041.3(e)(3) from the income documentation procedures required by § 1041.5(c)(2). The Bureau is revising this comment for consistency with the removal of § 1041.5 discussed below.

Subpart B—Underwriting

Subpart B sets forth the rule's underwriting requirements in §§ 1041.4 through 1041.6. The Bureau is removing and reserving the heading for subpart B; the removal of its contents is discussed below.

Section 1041.4 Identification of Unfair and Abusive Practice

Section 1041.4 provides that it is an unfair and abusive practice for a lender to make covered short-term or longer-term balloon-payment loans without reasonably determining that the consumers will have the ability to repay the loans according to their terms. For the reasons set forth above, the Bureau is removing and reserving § 1041.4 and removing the commentary accompanying § 1041.4.

Section 1041.5 Ability-to-Repay Determination Required

Section 1041.5 generally requires a lender to make a reasonable determination that a consumer has the ability to repay a covered short-term or a longer-term balloon-payment loan before making such a loan or increasing the credit available under such a loan. It also sets forth certain minimum requirements for how a lender may reasonably determine that a consumer has the ability to repay such a loan. For the reasons set forth above, the Bureau is removing and reserving § 1041.5 and removing the commentary accompanying § 1041.5.

Section 1041.6 Principal Step-Down Exemption for Certain Covered Short-Term Loans

Section 1041.6 provides a principal step-down exemption for covered short-term loans that satisfy requirements set forth in § 1041.6(b) through (e); §§ 1041.4 and 1041.5 do not apply to such conditionally exempt loans. For the reasons set forth above and for consistency with the removal of §§ 1041.4 and 1041.5, the Bureau is removing and reserving § 1041.6 and removing the commentary accompanying § 1041.6.

Subpart D—Information Furnishing, Recordkeeping, Anti-Evasion, Severability, and Dates

Subpart D contains the rule's requirements regarding information furnishing (§ 1041.10), registered information systems (§ 1041.11), and compliance programs and record retention (§ 1041.12); sets forth a prohibition against evasion (§ 1041.13); addresses severability (§ 1041.14); and sets forth effective and compliance dates (§ 1041.15). The Bureau is removing the portion of the subpart's heading that refers to information furnishing for consistency with the removal of §§ 1041.10 and 1041.11. Specific amendments to this subpart's contents are discussed below.

Section 1041.10 Information Furnishing Requirements

Among other things §§ 1041.5 and 1041.6, discussed above, require lenders when making covered short-term and longer-term balloon-payment loans to obtain consumer reports from information systems registered with the Bureau pursuant to § 1041.11. Section 1041.10, in turn, requires lenders to furnish certain information about each covered short-term and longer-term balloon-payment loan to each registered information system. For the reasons set forth above and for consistency with the other changes announced herein, the Bureau is removing and reserving § 1041.10 and removing the commentary accompanying § 1041.10.

Section 1041.11 Registered Information Systems

Section 1041.11 sets forth processes for information systems to register with the Bureau, describes the conditions that an entity must satisfy in order to become a registered information system, addresses notices of material change, suspension and revocation of a registration, and administrative appeals. For the reasons set forth above and for consistency with the other changes announced herein, the Bureau is removing and reserving § 1041.11 and removing the commentary accompanying § 1041.11.

Section 1041.12 Compliance Program and Record Retention

12(a) Compliance Program

Section 1041.12 provides that a lender making a covered loan must develop and follow written policies and procedures that are reasonably designed to ensure compliance with the requirements of part 1041. Comment 12(a)-1, in part, lists the various sections of the rule that must be addressed in the compliance program. The Bureau is removing from that comment the references to the ability-to-repay requirements in § 1041.5, the alternative requirements in § 1041.6, and the requirements on furnishing loan information to registered and preliminarily registered information systems in § 1041.10.

Comment 12(a)-2 explains that the written policies and procedures a lender must develop and follow under § 1041.12(a) depend on the types of covered loans that the lender makes, and provides certain examples. The Bureau is removing this comment as its examples are largely focused on compliance with §§ 1041.5, 1041.6, and 1041.10. The Bureau does not believe that it is useful to retain the remaining portion of this comment focusing solely on disclosures related to § 1041.9, although of course it remains true pursuant to § 1041.12(a) itself that a lender that makes a covered loan subject to the requirements of § 1041.9 must develop and follow written policies and procedures to provide the required disclosures to consumers.

The Bureau is making these changes for consistency with the removal of §§ 1041.5, 1041.6, and 1041.10 discussed above.

12(b) Record Retention

Section 1041.12(b) provides that a lender must retain evidence of compliance with part 1041 for 36 months after the date on which a covered loan ceases to be an outstanding loan. Section 1041.12(b)(1) through (5) sets forth particular requirements for retaining specific records, including: retention of the loan agreement and documentation obtained in connection with originating a covered short-term or longer-term balloon-payment loan (§ 1041.12(b)(1)); retention of electronic records in tabular format for covered short-term or longer-term balloon-payment loans regarding origination calculations and determinations under § 1041.5 (§ 1041.12(b)(2)) as well as loan type, terms, and performance (§ 1041.12(b)(3)); and retention of records relating to payment practices for covered loans (§ 1041.12(b)(4) and (5)). Revisions to the regulatory text of § 1041.12(b)(1) through (5), and related commentary, are discussed in turn further below.

Comment 12(b)-1 addresses record retention requirements generally. The Bureau is removing the portion of this comment explaining that a lender is required to retain various categories of documentation and information specifically in connection with the underwriting and performance of covered short-term and longer-term balloon-payment loans, while retaining (with minor revisions for clarity) the reference to records concerning payment practices in connection with covered loans. The comment also explains that the items listed in § 1041.12(b) are non-exhaustive as to the records that may need to be retained as evidence of compliance with part 1041. The Bureau is removing the remainder of this sentence, which specifically refers to loan origination and underwriting, terms and performance, and payment practices (the specific mention of which is no longer necessary if the other references are removed). The Bureau is making these changes for consistency with the removal of §§ 1041.4 through 1041.6 discussed above as well as the changes to § 1041.12(b)(1) discussed below.

12(b)(1) Retention of Loan Agreement and Documentation Obtained in Connection with Originating a Covered Short-Term or Covered Longer-Term Balloon-Payment Loan

Section 1041.12(b)(1) requires that, in order to comply with the requirements in § 1041.12(b), a lender must retain or be able to reproduce an image of the loan agreement and certain documentation obtained in connection with the origination of a covered short-term or longer-term balloon-payment loan. The Bureau is removing the language in the heading and in the introductory text for § 1041.12(b)(1) that refers to certain documentation obtained in connection with a covered short-term or longer-term balloon-payment loan, as well as the entirety of § 1041.12(b)(1)(i) through (iii) that specifies particular categories of such documentation. As proposed, the remainder of this provision requires a lender to retain or be able to reproduce an image of the loan agreement for each covered loan. Retaining a copy of the loan agreement is necessary for all lenders, pursuant to the requirement in § 1041.12(b) that lenders retain evidence of compliance for covered loans, in order to determine covered loan status for purposes of determining compliance with the Payment Provisions; the Bureau explicitly is retaining this requirement in § 1041.12(b)(1), for all covered loans, to avoid potential confusion. The Bureau is also removing the commentary accompanying

§ 1041.12(b)(1). The Bureau is making these changes for consistency with the other changes announced herein.

12(b)(2) Electronic Records in Tabular Format Regarding Origination Calculations and Determinations for a Covered Short-Term or Covered Longer-Term Balloon-Payment Loan under § 1041.5

Section 1041.12(b)(2) requires lenders to retain records regarding origination calculations and determinations for a covered short-term or longer-term balloon-payment loan, including specific required information listed in § 1041.12(b)(2)(i) through (v). It requires lenders to retain these records in an electronic, tabular format. For consistency with the removal of § 1041.5, the Bureau is removing and reserving § 1041.12(b)(2) and removing the commentary accompanying § 1041.12(b)(2).

12(b)(3) Electronic Records in Tabular Format Regarding Type, Terms, and Performance for Covered Short-Term or Covered Longer-Term Balloon-Payment Loans

Section 1041.12(b)(3) requires lenders to retain records regarding the type, terms, and performance of a covered short-term or longer-term balloon-payment loan, including specific required information listed in § 1041.12(b)(3)(i) through (vii). It requires lenders to retain these records in an electronic, tabular format. The Bureau is removing and reserving § 1041.12(b)(3) and removing the commentary accompanying § 1041.12(b)(3), for consistency with the removal of §§ 1041.5 and 1041.6 discussed above.

12(b)(5) Electronic Records in Tabular Format Regarding Payment Practices for Covered Loans

Section 1041.12(b)(5) requires lenders to retain records regarding the payment practices for covered loans, including specific required information listed in § 1041.12(b)(5)(i) and (ii). It requires lenders to retain these records in an electronic, tabular format. For consistency with the other changes announced herein, the Bureau is revising comment 12(b)(5)-1 by removing most of its content, which focuses on compliance with § 1041.12(b)(2) and (3) in conjunction with § 1041.12(b)(5), and in its place the Bureau is incorporating the description of how a lender complies with the requirement to retain records in a tabular format, which is currently set forth in comment 12(b)(2)-1.

Section 1041.15 Effective and Compliance Dates

15(d) November 19, 2020 Compliance Date

Section 1041.15 states the effective and compliance dates for various aspects of 12 CFR part 1041. In section 1041.15, for the reasons set forth above and for consistency with the other changes announced herein, the Bureau is removing paragraph (d), which provides that the compliance date for §§ 1041.4 through 1041.6, 1041.10, and 1041.12(b)(1) through (3) is November 19, 2020.

Appendix A to Part 1041—Model Forms

A-1 Model Form for First § 1041.6 Loan

Section 1041.6(e)(2)(i) requires a lender that makes a first loan in sequence of loans under the principal step-down exemption in § 1041.6 to provide a consumer with a notice that includes certain information and statements, using language that is substantially similar to the language set forth in Model Form A-1. For the reasons sets forth above and for consistency with the removal of § 1041.6, the Bureau is removing and reserving Model Form A-1.

A-2 Model Form for Third § 1041.6 Loan

Section 1041.6(e)(2)(ii) requires a lender that makes a third loan in sequence of loans under the principal step-down exemption in § 1041.6 to provide a consumer with a notice that includes certain information and statements, using language that is substantially similar to the language set forth in Model Form A-2. For the reasons sets forth above and for consistency with the removal of § 1041.6, the Bureau is removing and reserving Model Form A-2.

IX. Compliance and Effective Dates

The Bureau proposed that this final rule take effect 60 days after publication in the *Federal Register*.[350] As discussed above, the current compliance date for the Mandatory Underwriting Provisions of the 2017 Final Rule was changed from August 19, 2019, as originally set out in the 2017 Final Rule, to November 19, 2020, as set out in the final rule delaying this compliance date.

The Bureau sought comment on this aspect of the proposal. The Bureau received none. However, in order to ensure sufficient time to comply with procedures for submitting the rule to Congress under the Congressional Review Act, the Bureau has determined that the effective date for this revocation will be 90 days after publication in the *Federal Register*.

X. Dodd-Frank Act Section 1022(b)(2) Analysis

A. Overview

In developing this rule, the Bureau considered the potential benefits, costs, and impacts as required by section 1022(b)(2)(A) of the Dodd-Frank Act.[351] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by

---

[350] Section 553(d) of the APA generally requires that the effective date of a final rule be at least 30 days after publication of that final rule, except for (1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretive rules or statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule. 5 U.S.C. 553(d). This final rule does not establish any requirements; instead, it revokes the relevant provisions of the 2017 Final Rule. Accordingly, this final rule is a substantive rule which relieves a restriction that is exempt from section 553(d) of the APA.

[351] 12 U.S.C. 5512(b)(2)(A).

consumers to consumer financial products or services, the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act, and the impact on consumers in rural areas.

In advance of issuing this rule, the Bureau has consulted with the prudential regulators and the FTC, including consultation regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

1. The Need for Federal Regulatory Action

As explained above, the Bureau now believes that, in light of the 2017 Final Rule's dramatic market impacts as detailed in the section 1022(b)(2) analysis accompanying the 2017 Final Rule, its evidence is insufficient to support the findings that are necessary to conclude that the identified practices were unfair and abusive. The Bureau also now believes that the finding of an unfair and abusive practice as identified in § 1041.4 of the 2017 Final Rule rested on applications of section 1031(c) and (d) of the Dodd-Frank Act that the Bureau should no longer use given the identification of better interpretations of these statutory provisions. The Bureau therefore is revoking the Mandatory Underwriting Provisions of the 2017 Final Rule because it believes the facts and the law do not adequately support the conclusion that the identified practice meets the standard for unfairness or abusiveness under section 1031(c) and (d) of the Dodd-Frank Act.[352]

[352] The 2017 Final Rule stated that the existence of a market failure supported the need for Federal regulatory action. As the Bureau now believes that there is not a need for the Federal regulatory action described in the 2017 Final Rule, it is not necessary for the Bureau here in the section 1022(b)(2) analysis to identify or address a market failure.

2. Data and Evidence

In this section 1022(b)(2) analysis, the Bureau endeavors to consider comprehensively the economic benefits and costs that are likely to result from revoking the Mandatory Underwriting Provisions of the 2017 Final Rule, possibly including some indirect effects.

Since the issuance of the 2017 Final Rule, the body of evidence bearing on benefits and costs has only slightly expanded. As such, with the exception of the new studies discussed below and in the proposal for this final rule,[353] the Bureau has considered the same information as it considered in the section 1022(b)(2) analysis of the 2017 Final Rule, although as discussed in parts V and VI of this final rule, the Bureau has determined that the key evidence is insufficient to support finding an unfair and abusive act or practice as well as warranting regulatory intervention.[354] The new research that has become available after the drafting of the 2017 Final Rule has relatively little impact on the Bureau's analysis compared to the evidence cited in the 2017 Final Rule, as the implications of this new evidence for total surplus and consumer welfare are less clear or probative than previously considered evidence.

The Bureau invited submission of additional data and studies that could supplement those relied on in the 2017 Final Rule's analysis which form the predicate for the estimates here as well as comments on the analyses of benefits and costs contained in the 2017 Final Rule and relied on here. While commenters did note some new studies that they believe are relevant to this final rule, the Bureau still lacks representative data that could be used to analyze all effects of this final rule. Absent these data, portions of the analysis rely, at least in part, on qualitative evidence provided to the Bureau in previous comments, responses to RFIs, and academic papers;

[353] 84 FR 4252, 4291-94.

[354] The same evidence may be evaluated differently for purposes of legal and economic analyses.

general economic principles; and the Bureau's experience and expertise in consumer financial markets. As such, many of the benefits, costs, and impacts of this final rule are presented in general terms or ranges (as they were in the section 1022(b)(2) analysis of the 2017 Final Rule), rather than as point estimates. Additional details underlying this analysis can be found in the 2017 Final Rule and the 2019 NPRM.

3. Major Provisions and Coverage of the Rule

In this analysis, the Bureau focuses on the benefits, costs, and impacts of the three major elements of the final rule: (1) the amendment of the 2017 Final Rule to eliminate the requirement that lenders reasonably determine borrowers' ability to repay covered short-term and longer-term balloon-payment loans according to their terms (along with the principal step-down exemption allowing for a principal step-down approach to issuing a limited number of short-term loans); (2) the amendment of the 2017 Final Rule to eliminate the recordkeeping requirements associated with (1); and (3) the amendment of the 2017 Final Rule to eliminate requirements concerning lenders furnishing information to registered information systems as well as associated requirements.

As discussed in the 2017 Final Rule, there are two major classes of short-term lenders that would be affected by the Mandatory Underwriting Provisions: payday/unsecured short-term lenders, both storefront and online, and short-term vehicle title lenders.[355] Any depository institution offering a deposit advance product would also be likely to be affected by the 2017 Final Rule's provisions.[356] Similarly, any depository institution that might have considered

[355] 82 FR 54472, 54814.

[356] *See id.*

offering a deposit advance product would likely be affected by the 2017 Final Rule's provisions.[357]

In addition to short-term lenders, lenders making longer-term balloon-payment loans (either vehicle title or unsecured) are also covered by the 2017 Final Rule's requirements concerning underwriting and RISes. It follows that the elimination of the mandatory underwriting and RIS requirements for lenders of each of these types have similar effects as to those for short-term lenders.

The amendment of the 2017 Final Rule to eliminate its mandatory underwriting and RIS requirements carries implications relating to recordkeeping requirements that apply to any lender making covered short-term or longer-term balloon-payment loans. The elimination of the RIS provisions relates to the application process and operational requirements for entities who otherwise would have sought to become RISes.[358]

4. Description of the Baseline

The major impact of this final rule would be to eliminate the Federal regulations requiring underwriting of covered short-term and longer-term balloon-payment loans. No lenders are required to comply with the 2017 Final Rule until the compliance date (which currently is November 19, 2020) and until the court in litigation challenging the 2017 Final Rule lifts its stay of the compliance date. Accordingly, since the Bureau is finalizing this Rule before

[357] *Id.* at 54815. Notably, a May 23, 2018 OCC bulletin encourages banks to offer responsible short-term, small-dollar installment loans, which would likely compete with the loans covered by this final rule. Bulletin, Office of the Comptroller of the Currency, *Core Lending Principles for Short-Term, Small-Dollar Installment Lending* (OCC Bulletin 2018-14, May 23, 2018), *https://www.occ.treas.gov/news-issuances/bulletins/2018/bulletin-2018-14.html*. *See also* 83 FR 58566, 58567 (Nov. 20, 2018). Given these changes, it is likely that these firms will more seriously consider offering these products under this rule.

[358] In this part, the Bureau's references to RISes generally include firms in any stage of becoming an RIS, whether they would have been preliminarily approved, provisionally registered, or would have completed the process at the time this rule will go into effect.

lenders have to comply with the Mandatory Underwriting Provisions in the 2017 Final Rule, no lenders have had to comply with them. As a practical matter, imposing regulatory requirements and eliminating them before covered entities have had to actually comply with them means there is little real-world effect on stakeholders from the combined effect of the imposition and the elimination of the requirements, that is, the combined effect is returning to the status quo prior to the Bureau issuing the 2017 Final Rule.[359]

Nevertheless, the Bureau is considering the Bureau's two regulatory actions (*i.e.*, issuing the 2017 Final Rule and eliminating the Mandatory Underwriting Provisions of the 2017 Final Rule prior to its compliance date) separately for section 1022(b)(2) analysis purposes. The effects of these provisions were evaluated in a section 1022(b)(2) analysis when the Bureau issued the 2017 Final Rule. The elimination of these same provisions is evaluated in this section 1022(b)(2) analysis.

The Bureau takes the 2017 Final Rule as the baseline, and considers economic attributes of the relevant markets as the Bureau projected them to be under the 2017 Final Rule and the existing legal and regulatory structures (*i.e.*, those that have been adopted or enacted, even if compliance is not yet required) applicable to providers.[360] This approach assumes that any

[359] For this section 1022(b)(2) analysis, only the costs of eliminating the requirements are relevant, but the Bureau notes that lenders are under no obligation to reverse any changes made to their processes and procedures to comply with the 2017 Final Rule, and so any lender that would incur costs to do so could simply not reverse the modifications to avoid incurring them. Additionally, the Bureau does not have any evidence that any lenders making covered loans made any such modifications to fully comply with the 2017 Final Rule.

[360] The Bureau has discretion in each rulemaking to choose the relevant provisions to discuss and to choose the most appropriate baseline for that particular rulemaking in its analysis under section 1022(b)(2)(A) of the Dodd-Frank Act.

actions already undertaken and those that will be necessary to take in anticipation of the compliance date would also be reversed following elimination of the provisions.[361]

The Bureau has considered the same information as it considered in the section 1022(b)(2) analysis of the 2017 Final Rule and has chosen not to revisit the specific methodologies in that analysis given the lack of new evidence that would suggest a change to that analysis. As such, the expected impacts articulated in those analyses are assumed to be features of the baseline here.

The baseline specifically recognizes regulatory differences across States and consumers in the data simulations discussed below as detailed in the proposal.[362] In general, the Bureau believes that the State laws have become more restrictive over the past seven years, so that in this respect the simulations here are more likely to overstate than understate the effects of the final rule.[363]

5. Major Impacts of the Rule

The primary impact of this final rule relative to the baseline in which compliance with the Mandatory Underwriting Provisions of the 2017 Final Rule becomes mandatory will be a substantial increase in the volume of short-term payday and vehicle title loans (measured in both number and total dollar value), and a corresponding increase in the revenues lenders realize from

---

[361] The Bureau also notes that compliance readiness is ongoing, and lenders may or may not continue to incur costs in anticipation of needing to comply unless and until uncertainty around the Mandatory Underwriting Provisions is resolved.

[362] 84 FR 4252, 4823.

[363] Another possible change that could affect the baseline is the June 2018 Community Financial Services of America (a trade association representing payday and small-dollar lenders) revision of its best practices to add that its members should, before extending credit, "undertake a reasonable, good-faith effort to determine a customer's creditworthiness and ability to repay the loan." This practice applies to other small-dollar loans the member makes. *See* Cmty. Fin. Servs. of Am., *Best Practices for the Small-Dollar Loan Industry*, *https://www.cfsaa.com/files/files/CFSA-BestPractices.pdf* (last visited Apr. 28, 2020).

these loans. The simulations set forth in the section 1022(b)(2) analysis accompanying the 2017 Final Rule based on the Bureau's data indicate that relative to the chosen baseline payday loan volumes will increase by 104 percent to 108 percent, with an increase in revenue for payday lenders between 204 percent and 213 percent.[364] Simulations of the impact on short-term vehicle title lending predict an increase in loan volumes of 809 percent to 1,329 percent relative to the chosen baseline, with an approximately equivalent increase in revenues.

The Bureau expects, again relative to the chosen baseline, that these increases will result in an increase in the number of storefronts relative to the market projected to exist under the 2017 Final Rule based on the changes in storefronts in States which adopted restrictive regulations.[365] This might in turn improve physical access to credit for consumers, especially for consumers in rural areas. Additionally, the increase in storefronts is likely to impact small lenders and lenders in rural areas more than larger lenders and those in areas of greater population density. However, the practical improvements in consumer physical access to payday loans are not likely to be as substantial as the increase in storefronts may imply, as explained in the 2017 Final Rule.[366] The Bureau also anticipates that online options would be available to the vast majority of current payday borrowers, including those in rural areas.[367] Therefore, the improved physical access to payday storefronts will likely have the largest impact on a small set

[364] These calculations are based on the same simulations the Bureau described in the 2017 Final Rule. The Bureau ran a number of simulations based on different market structures that may occur as a result of the Rule. The estimates cited here come from the specifications where lenders would make loans under both the mandatory underwriting and principal step-down approaches. *See* the 2017 Final Rule for descriptions of all the simulations conducted by the Bureau, and their results. 82 FR 54472, 54824.

[365] Supplemental Findings, chapter 3 part B.

[366] In States with substantial regulatory changes that led to substantial decreases in payday storefronts, over 90 percent of borrowers had to travel an additional five miles or less. 82 FR 54472, 54842.

[367] This geographic impact on borrowers was discussed specifically in the 2017 Final Rule's section on *Reduced Geographic Availability of Covered Short-Term Loans* in part VII.F.2.b.v which relies heavily on chapter 3 of the Bureau's Supplemental Findings. 82 FR 54472, 54842.

of rural consumers who would have needed to travel substantially longer to reach a storefront, and who lack access to online payday loans (or strongly prefer loans initiated at a storefront to those initiated online).

Increased revenues (more precisely, increased profits) relative to the chosen baseline are expected to lead many current firms that would have exited the market under the Rule to remain in the market. Additionally, many of the restrictions imposed by the 2017 Final Rule could have been voluntarily adopted by lenders absent the 2017 Final Rule, but the Bureau has no evidence that they were. That lenders did not voluntarily adopt these provisions implies the 2017 Final Rule's impacts are welfare-decreasing for lenders. Reversing these restrictions should therefore be welfare-enhancing for lenders.

As for the overall effects on consumers, as the Bureau noted in the 2017 Final Rule, the evidence on the impacts of the availability of payday loans on consumer welfare varies.[368] The Bureau stated that "access to payday loans may well be beneficial for those borrowers with discrete, short-term needs, but only if they are able to successfully avoid long sequences of loans."[369] Given the available evidence, the Bureau concluded that the overall impacts of the decreased loan volumes resulting from the 2017 Final Rule's Mandatory Underwriting Provisions on consumers would be positive,[370] and it follows that the inverse effects would ensue, relative to the chosen baseline, from eliminating the requirements in the 2017 Final Rule.

The Bureau has also considered new and additional evidence that was not available at the time of the 2017 Final Rule. There are few such studies that deal with the pecuniary effects of payday loans on consumers, and none that specifically deal with the effects of the loans that

---

[368] *See, e.g.*, *id.* at 54818, 54842-46.

[369] *Id.* at 54846.

[370] *Id.* at 54835, 54842.

would be eliminated by the 2017 Final Rule (*e.g.*, those beyond the fourth loan in a sequence or the seventh non-underwritten loan in a year). As a result, the new studies do not affect the Bureau's analysis as set forth above.

Relative to the considerations above, the remaining benefits and costs of this final rule—again relative to the baseline in which compliance with the 2017 Final Rule will become mandatory—are much smaller in their magnitudes and economic importance. Most of these impacts manifest as reductions in administrative, compliance, or time costs that compliance with the 2017 Final Rule would entail; or as potential costs from revoking aspects of the 2017 Final Rule that could have decreased fraud or increased transparency. The Bureau expects most of these impacts to be fairly small on a per loan/consumer/lender basis. These impacts include, among other things, those applicable to the RISes under the 2017 Final Rule; those associated with reduced furnishing requirements on lenders and consumers (*e.g.*, avoiding the costs to establish connection with RISes, forgone benefits from reduced fraud); those associated with making an ability-to-repay determination for loans that require one (*e.g.*, avoiding the cost to obtain all necessary consumer reports, forgoing the benefit of decreased defaults); those associated with avoiding the 2017 Final Rule's record retention obligations that are specific to the Mandatory Underwriting Provisions; those associated with eliminating the need for disclosures regarding principal step-down loans; and the additional impacts associated with increased loan volumes (*e.g.*, changes in defaults or account closures, non-pecuniary changes to consumer welfare). Each of these benefits and costs, broken down by type of market participant, was discussed in detail in the proposal for this rule and the Bureau received no new evidence to change that analysis.[371]

[371] 84 FR 4252, 4286-95.

B. Potential Benefits and Costs of the Final Rule to Consumers and Covered Persons—Provisions Relating Specifically to Ability-to-Repay Determinations for Covered Short-Term and Longer-Term Balloon-Payment Loans

Eliminating the Mandatory Underwriting Provisions, and the associated restrictions on reborrowing, is likely to have a substantial impact on the markets for these products relative to the markets that would exist under the Mandatory Underwriting Provisions in the 2017 Final Rule. In order to present a clear analysis of the benefits and costs of this final rule, this section first describes the benefits and costs of this final rule to covered persons relative to the baseline if compliance with the Mandatory Underwriting Provisions in the 2017 Final Rule were required and then discusses the implications of this compliance for the markets for these products.[372] The benefits and costs to consumers are then described.

1. Benefits and Costs to Covered Persons

As this final rule removes restrictions on the operational requirements for lenders, allowing them to not incur the costs associated with complying with the Mandatory Underwriting Provisions in the 2017 Final Rule, this section discusses the overall benefits and costs to lenders associated with not having to comply with the Mandatory Underwriting Provisions in the 2017 Final Rule rather than having to do so.

[372] The range of credit options available to borrowers with short-term credit needs is likely to continue to evolve, and if the 2017 Final Rule were to become effective it would affect that evolution along with other factors, such as changes to State laws and regulations, technological changes, and general economic trends. The Bureau is not in a position to estimate the specific impact the 2017 Final Rule would have on the offering of substitute products. Therefore the Bureau does not attempt to assess here any strategic de-evolution of the market that will result if compliance with the 2017 Final Rule becomes mandatory. Likewise, the Bureau stated that the potential evolution of lender offerings that may arise in response to the 2017 Final Rule was beyond the scope of the section 1022(b)(2) analysis in the 2017 Final Rule. *See* 82 FR 54472, 54818, 54835.

a. Elimination of the Operational Requirements Associated with Mandatory Underwriting and Principal Step-Down Approach

Under this amendment to the 2017 Final Rule, lenders will not need to consult their own records and the records of their affiliates to determine whether the borrower has taken out any prior covered short-term or longer-term balloon-payment loans that were still outstanding or were repaid within the prior 30 days. Lenders will not need to maintain the ability-to-repay-related records required under the 2017 Final Rule's Mandatory Underwriting Provisions. Lenders will not need to obtain a consumer report from an RIS (if available) in order to obtain information about the consumer's borrowing history across lenders. Lenders also will no longer be required to furnish information regarding covered short-term and longer-term balloon-payment loans they originate to all RISes. Lenders will also be freed from the obligation imposed by the 2017 Final Rule to obtain and verify information about the amount of an applicant's income (unless not reasonably available) and major financial obligations.

The amendment to the 2017 Final Rule's elimination of each of these operational requirements reduces costs that lenders would have incurred under the 2017 Final Rule for loan applications (not just for loans that are originated). Additionally, under the amendment, lenders will not be required to develop or adhere to procedures to comply with each of these operational requirements and train their staff in them. The Bureau believes that many lenders use automated systems when originating loans, and would modify those systems, or purchase upgrades to those systems, to address many of the operational requirements associated with the Mandatory Underwriting Provisions of the 2017 Final Rule. As further discussed in the 2019 NPRM's proposal to amend the Mandatory Underwriting Provisions in the 2017 Final Rule, reversing the obligation to incur operational costs should be of relatively minimal benefit to lenders.

Reversing the obligation in fact could result in small costs for any lenders who changed their processes and procedures in anticipation of having to comply with the Rule; however, lenders are under no obligation to reverse these modifications, and so any lender that would incur costs to do so could simply not reverse the modifications to avoid incurring them. Additionally, most lenders making covered loans apparently have not changed their processes and procedures to fully comply with the Mandatory Underwriting Provisions in the 2017 Final Rule.

Each of the costs lenders would not incur as a result of amending the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions is discussed in the 2017 Final Rule 1022(b)(2) analysis at part X.F.

b. Effect on Loan Volumes and Revenue from Eliminating Underwriting Requirements and Restrictions on Certain Reborrowing

In order to simulate the effects of the 2017 Final Rule on lender revenue, it was necessary to impose an analytic structure and make certain assumptions about the impacts of the Rule and apply them to the data. The results of the simulations are reviewed here; the structure, assumptions, and data used by the Bureau were described in detail in the 2017 Final Rule.[373] None of the underlying data, assumptions, or structures have changed in the Bureau's analysis of the impacts of this rule. As such, the description in the 2017 Final Rule also describes the simulations used here.[374]

---

[373] 82 FR 54472, 54824.

[374] The numbers cited here are simply the reverse of the numbers cited in the 2017 Final Rule as being the most likely. There, the Bureau estimated a decrease in loan volumes of 51 to 52 percent and a decrease in revenues of 67 percent to 68 percent for payday loans, and a decrease in both loan volumes and revenues of 89 to 93 percent for vehicle title loans. *Id.* at 54827, 54834. Taking the decreased values as the baseline and reintroducing the reduced loan volumes and revenues yields the numbers cited here.

The Bureau's simulations suggest that storefront payday loan volumes will increase between 104 percent and 108 percent under this final rule relative to the 2017 Final Rule baseline. The Bureau estimates that revenues of storefront payday lenders will be between 204 percent and 213 percent higher if they do not have to comply with the requirements in the 2017 Final Rule.[375] For vehicle title lending, the simulated impacts are larger. The Bureau's simulations suggest that relative to the 2017 Final Rule baseline vehicle title loan volumes will increase under the final rule by between 809 percent and 1,329 percent, with a corresponding increase in revenues for vehicle title lenders.[376] Using CFSI's most recent estimated revenues for vehicle title lenders, this would mean the elimination of the Mandatory Underwriting Provisions of the 2017 Final Rule will translate into an increase in annual revenues for these lenders of approximately $3.9 billion to $4.1 billion.[377]

A notable impact of this increase in loan volumes and revenues is that many storefronts will likely exist under this final rule that would not if they had to comply with the Mandatory Underwriting Provisions of the 2017 Final Rule. A pattern of contractions in storefronts has played out in States that have imposed laws or regulations that resulted in similar reductions in volume as those projected under the 2017 Final Rule. To the extent that lenders cannot replace

---

[375] The loan volume and revenue estimates differ for payday loans as the 2017 Final Rule imposed limits on the sizes of loans issued under the principal step-down approach, as well as limits on the sizes of reborrowed loans. In the 2017 Final Rule, the Bureau estimated that approximately 40 percent of the reduction in revenues resulted from limits on loan sizes, while the remaining 60 percent was the result of decreased loan volumes. *Id.* at 54827. The increases in revenues presented here are estimated to stem from the same sources, in the same proportions (*i.e.*, approximately 40 percent from larger loans, and approximately 60 percent from additional loans).

[376] As vehicle title loans are ineligible for the principal step-down approach under the 2017 Final Rule, there was no binding limit on the size of these loans. This resulted in a larger decrease in volumes for vehicle title loans relative to payday (as loans could only be issued under the mandatory underwriting approach) but ensured the corresponding decrease in revenues was more similar to the decrease in loan volumes (since all issued loans were unrestricted in their amounts relative to the Rule's baseline). The increases cited here follow a similar pattern, for similar reasons.

[377] Based on pre-2017 Final Rule estimated revenues for vehicle title lenders of approximately $4.4 billion, reported in Eric Wilson & Eva Wolkowitz, *2017 Financially Underserved Market Size Study*, at 46 (Ctr. for Fin. Servs. Innovation (Dec. 2017)), *https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2017/04/27001546/2017-Market-Size-Report_FINAL_4.pdf*, with medium confidence.

reductions in revenue by adapting their products and practices, it follows that such a contraction—or, in the case of vehicle title, an elimination—would be a likely (perhaps inevitable) response to complying with the Mandatory Underwriting Provisions of the 2017 Final Rule. It likewise follows that, under this amendment to the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions, there will be a corresponding increase in the number of storefronts relative to the number of them that would exist if they had to comply with the Mandatory Underwriting Provisions in the 2017 Final Rule.

The Bureau notes that in recent years there has been a gradual shift in the market towards longer-term loans where permitted by State law. The Bureau does not have sufficient data to assess whether that trend has accelerated since the issuance of the 2017 Final Rule in anticipation of the compliance date.[378] This trend was considered in the 2017 Final Rule as well.[379] To the extent these lenders have already made these adaptations, and would not shift their business practices back following adoption of this amendment to the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions, the loan volume and revenue estimates above may be somewhat overstated.

Several industry commenters stated in response to the 2019 NPRM that either all lenders would close unless the Mandatory Underwriting Provisions were eliminated or that these particular lenders would not offer any products covered by the 2017 Final Rule. They further argued that, as a result, the estimates based on the simulations understate the true change in

[378] Since the issuance of the 2017 Final Rule, Florida has amended its laws to open the door to longer-term loans at interest rates above the standard usury limit. *See* Fla. Stat. Ann. § 560.404. On the other hand, a voter referendum in Colorado has resulted in a law, effective February 1, 2019, that capped interest rates on certain longer-term loans. *See* Colo. Legislative Council Staff, *Initiative #126 Initial Fiscal Impact Statement*, *https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2017-2018/126FiscalImpact.pdf*; *see also* Colo. Sec'y of State, *Official Certified Result—State Offices & Questions*, *https://results.enr.clarityelections.com/CO/91808/Web02-state.220747/#/c/C_2* (Proposition 111).

[379] 82 FR 54472, 54835.

lending. The Bureau does not agree that all payday lenders would close if the Bureau did not amend the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions. While many storefronts would close without this intervention and some lenders may stop offering covered products or continuing to operate, evidence from States that have implemented restrictions on lending suggest that the industry would not disappear entirely under the 2017 Final Rule baseline and commenters did not offer any specific evidence to the contrary. As a result, the Bureau does not believe the estimated benefits to payday lenders are larger than stated in the 2019 NPRM.

One credit reporting company suggested in response to the 2019 NPRM that lenders are increasingly underwriting covered loans and reporting these loans to an information system thereby negating any need for the Bureau to mandate lenders do so. While the Bureau does not have and did not receive data to verify whether lenders have moved toward increased underwriting and reporting of loans, the Bureau did offer the possibility that some lenders may have already made changes in response to the Mandatory Underwriting Provisions of the 2017 Final Rule. As a result, amending the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions might increase costs for these lenders if they chose to undo those changes, but they would not be required to do so. To the extent that any lenders have increased their underwriting of covered loans for reasons unrelated to the 2017 Final Rule, some of the effects of this amendment to the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions would be overstated.

One advocacy group argued the Bureau should net out from the benefits from amending the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions the transfers between consumers and lenders which would reduce the benefit to lenders in the analysis. The Bureau does not net out transfers between different groups in its analyses and instead delineates costs and benefits for covered persons and consumers separately. It is not double-counting to describe increased revenues as a benefit to lenders and increased fees as a cost to consumers.[380]

2. Benefits and Costs to Consumers

a. Benefits to Consumers and Access to Credit

Borrowers would likely have experienced reduced access to new loans—*i.e.*, loans that are not part of an existing loan sequence—from the restrictions and operational requirements of the Mandatory Underwriting Provisions of the 2017 Final Rule. Some borrowers also would have been prevented from rolling loans over or reborrowing shortly after repaying a prior loan under the 2017 Final Rule. Some borrowers might still have been able to borrow, but for smaller amounts or with different loan structures, and might have found this less preferable to them than the terms they would have received absent the 2017 Final Rule. This amendment to eliminate the 2017 Final Rule's Mandatory Underwriting Provisions reverses each of the effects that would otherwise result from the 2017 Final Rule, decreasing the time and effort consumers would need to expend to obtain a covered short-term or longer-term balloon-payment loan, and improving their access to credit, which may carry pecuniary and non-pecuniary benefits.

The Bureau's simulations (discussed above) suggest that the 2017 Final Rule's requirements (again including the principal step-down exemption) would have prevented between 5.9 and 6.2 percent of payday borrowers from initiating a sequence of loans that they would have initiated absent the Rule.[381] That is, since most consumers take out six or fewer

[380] Given that the Bureau counts fees consumers pay as a cost to consumers, subtracting out those fees from lenders' revenues in its consideration of benefits to covered persons would double-count those fees. Likewise, subtracting fees from lenders' revenues and not including them as costs to consumers would obfuscate the effect on consumers. To clearly identify the costs and benefits for each group, the Bureau considers them separately.

[381] *See id.* at 54599-601. The simulation did not attempt to estimate which type(s) of consumers would be prevented from initiating a sequence of loans under the 2017 Final Rule or which type(s) of consumer would be able to obtain loans under the principal step-down exemption.

loans each year, and are not engaged in long sequences of borrowing, the 2017 Final Rule as a whole would not have limited their borrowing. However, under this final rule, consumers will be able to extend their sequences beyond three loans and will not be required to repay one-third of the loan each time they reborrow. As a result, many loans will be taken out beyond the sequence limitations imposed by the 2017 Final Rule (*e.g.*, fourth and subsequent loans within 30 days of the prior loan); these loans account for the vast majority of the additional volume in the Bureau's simulations.

Elimination of Operational Requirements

The Bureau is amending the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions, which removes the operational requirements associated with underwriting loans originated under the Mandatory Underwriting Provisions, and the various recordkeeping procedures associated with the principal step-down approach. As such, under the amendment consumers should obtain funds faster than under the 2017 Final Rule. Consumers obtaining loans that would have been subject to the 2017 Final Rule's Mandatory Underwriting Provisions will experience the most significant gains from the amendment of the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions. Estimates of the time required to manually process an application suggest that eliminating the Mandatory Underwriting Provisions will make the borrowing process 15 to 45 minutes faster, a consideration many of these consumers may find important given than convenience is an important product feature on which payday lenders compete for customers.[382] Additionally, borrowers will not need to obtain and provide to the lender certain documentation required under the Mandatory Underwriting Provisions of the

[382] The Bureau noted in the 2017 Final Rule that it anticipated that most lenders would use automation to make the ability-to-repay determination, which would take substantially less time to process. *See* 82 FR 54472, 54631, 54632 n.767. To the extent that lenders would have used automation, the time savings under this rule will be substantially smaller.

2017 Final Rule; amending the 2017 Final Rule to eliminate these Mandatory Underwriting Provisions will minimize the complexity of the process, and obviate the need for repeat trips to the lender if the borrower did not bring all the required documents initially, thereby making the payday loan process more convenient for consumers seeking loans that would otherwise have been subject to the Mandatory Underwriting Provisions.

Industry commenters stated in comments submitted in response to the 2019 NPRM that eliminating the Mandatory Underwriting Provisions of the 2017 Final Rule would save consumers both time and money as they would not pursue marginally faster, but more expensive options. The Bureau agrees consumers would save time and effort as a result of this final rule.

Improved Access to Initial Loans

Because the Bureau's amendment of the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions would remove the restrictions on obtaining loans, consumers will have increased access to loans. Initial covered short-term loans—*i.e.*, those taken out by borrowers who have not recently had a covered short-term loan—are presumably taken out because of a need for credit that is not the result of prior borrowing of covered short-term loans. Consumers newly able to access these loans may experience a variety of benefits as detailed below.

Based on the simulations discussed in the 2017 Final Rule, the Bureau estimates that amending the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions would result in lenders making about 5 percent more initial payday loans (*i.e.*, those that are not part of an existing sequence) due to the elimination of the annual loan limits, and roughly 6 percent more borrowers will be able to initiate a new sequence of loans that they could not start under the 2017 Final Rule. That is, amending the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions would result in lenders being able to make 5 percent more payday loans to satisfy a likely new need for credit (based on the removal of the annual limits on borrowing) and 6 percent of payday borrowers will have access to new sequences of loans. Vehicle title borrowers are likely to realize greater increases in access to loans relative to payday borrowers since a greater share of vehicle title borrowers were expected to lose access under the 2017 Final Rule. As discussed in the section 1022(b)(2) analysis for the 2017 Final Rule, this difference in the change in access was in part because the 2017 Final Rule's principal step-down approach did not provide for vehicle title loans and borrowers may not have been able to substitute to payday loans for several reasons.[383]

Consumers who would be able to obtain a new loan because of the elimination of the Mandatory Underwriting Provisions in the 2017 Final Rule will not be subject to some of the costs of those provisions, including not being forced to forgo certain purchases, incur high costs from delayed payment of existing obligations, or incur high costs and other negative impacts by simply defaulting on bills; nor will they face the need to borrow from sources that may be more expensive or otherwise less desirable than payday or vehicle title loans. These borrowers may avoid overdrafting their checking accounts, which may be more expensive than taking out a payday or single-payment vehicle title loan. Similarly, they may avoid "borrowing" by paying a bill late, which can lead to late fees (which may or may not be more expensive than a payday or vehicle title loan) or other negative consequences like the loss of utility service. The section 1022(b)(2) analysis in the 2019 NPRM discussed survey evidence which provides some information about what borrowers are likely to do if they do not have access to these loans.[384]

[383] 82 FR 54472, 54840-41.

[384] 84 FR 4252, 4289.

Industry commenters stated in comments in response to the 2019 NPRM that there are no good alternatives for some payday loan borrowers, often stating the alternatives are expensive (overdraft, non-sufficient funds (NSF), pawn). Some further stated that an ability-to-repay requirement would limit access for those who most need payday loans, such as those with no short-term income, those with high income volatility, and gig economy workers. The Bureau discussed these alternatives in the 2017 Final Rule taking their relative costs into account there and in the analysis for this amendment to the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions.[385]

Several consumer groups and State attorneys general stated in comments in response to the 2019 NPRM that the increase in credit access is smaller than stated in the 2019 NPRM because consumers increasingly have access to other alternatives such as installment loans which they willingly take up. These groups cited the experiences of consumers in several States such as Texas. Many of these commenters stated these alternatives were better for consumers than payday or title loans and supported this by noting that other products can help to build credit for borrowers or are used to finish repaying payday loans. Consumer groups also commented that the Bureau overstated costs in the 2017 Final Rule to be conservative (by not accounting for product changes when considering access to credit) and since this analysis reverses those effects, benefits to consumers were overstated in the 2019 NPRM. As stated in this analysis and that of the 2017 Final Rule, the Bureau does not consider changes in lenders' product offerings (including newly offering installment loans) in response to the 2017 Final Rule or more generally. The Bureau noted in the proposal that changes in industry structure likely cause the Bureau's estimates of increased revenues and benefits of access to be upper bounds as some

[385] 82 FR 54472, 54842-46.

lenders were already shifting to installment loans in some areas prior to this amendment to the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions.

Elimination of Limits on Loan Size

The 2017 Final Rule placed limits on the size of loans lenders may issue via the principal step-down approach, which, as discussed above, is one of the requirements for the principal step-down exemption from the Mandatory Underwriting Provisions for covered short-term loans. Eliminating the Mandatory Underwriting Provisions from the 2017 Final Rule will allow borrowers (specifically, borrowers who cannot satisfy the Mandatory Underwriting Provisions for covered short-term loans and thus who can only borrow under the principal step-down approach) to take out larger initial loans (where allowed by State law), and reborrow these loans in their full amount. In the simulation that the 2017 Final Rule stated best approximates the market as it would exist under the 2017 Final Rule,[386] around 40 percent of the increase in payday loan revenues described in part VIII.B.1.c above will be the result of eliminating the $500 cap on initial loans and step-down requirements on loans issued via the principal step-down approach.

Some commenters stated in response to the 2019 NPRM that because loan size caps are a price ceiling, they reduce the supply of loans so that eliminating the Mandatory Underwriting Provisions would increase access to more than 1 million consumers. The Bureau agrees that price ceilings generally reduce supply in competitive markets, but notes that a cap on the loan

[386] In the 2017 Final Rule, the Bureau describes the results from simulations under three sets of assumptions. This rule presents results from the simulation approach preferred by the Bureau in the 2017 Final Rule as the one most likely to reflect the effects of the Rule, wherein borrowers are assumed to: take principal step-down loans initially, apply for loans subject to an ability-to-repay determination only after exhausting the principal step-down loans, and be approved for each loan under the mandatory underwriting approach with a probability informed by industry estimates.

amount (as opposed to a cap on the interest rate) is not a price ceiling.[387] Further, it is not clear that borrowers who would otherwise choose a loan amount above the cap would not still use a payday loan in the presence of a cap and instead borrow a smaller amount. Meanwhile, other comments stated that loan size caps cause consumers to take more loans than they otherwise would, either simultaneously or sequentially, and that loan prices do not always rise to State caps. The Bureau notes consumers may take a greater number of loans as a result of a cap on loan sizes, at least in States without a state-mandated tracking database, but the Bureau does not have evidence that this necessarily occurs. Additionally, recent research discussed below provides additional evidence that lenders do charge the prevailing cap in each State.[388]

Elimination of Limits on Reborrowing

For storefront payday borrowers, most of the increase in the availability of credit as a result of amending the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions will be due to borrowers who have recently taken out loans being able to roll over their loans or borrow again within a shorter period of time as compared to the baseline of the 2017 Final Rule. This is because the Mandatory Underwriting Provisions (including the principal step-down provision) in the 2017 Final Rule impose limits on the frequency, timing, and amount of reborrowing and eliminating the Mandatory Underwriting Provisions lifts these limitations.

The lessened constraints on reborrowing will additionally benefit consumers who wish to reborrow loans that would have been made via the principal step-down approach under the 2017 Final Rule but are unable to decrease the principal of their loans. This improved access to credit

---

[387] As discussed below, new research also provides evidence that a price cap on the interest rate of payday loans does not necessarily reduce the supply of loans. *See* Amir Fekrazad, *Impacts of Interest Rate Caps on the Payday Loan Market: Evidence from Rhode Island*, J. Banking & Fin. (2020).

[388] *Id.*

could result in numerous benefits for consumers, including avoiding delinquencies on the loan and the potential NSF fees associated with such delinquencies, or avoiding the negative consequences of being compelled to make unaffordable amortizing payments on the loan. However, the Bureau's simulations suggest that the majority of the increased access to credit as a result of elimination of the Mandatory Underwriting Provisions will result from lifting of the reborrowing restrictions, rather than removing of the initial loan size cap and the forced step-down features of loans made via the principal step-down approach.

The Bureau does not believe eliminating the Mandatory Underwriting Provisions in the 2017 Final Rule will lead to a substantial decrease in instances of borrowers defaulting on payday loans. The Bureau believes the 2017 Final Rule's principal step-down provisions would likely encourage many consumers to reduce their debt over subsequent loans rather than to default, and eliminating this provision will reverse this effect. It is necessarily true, however, that some borrowers may avoid a default that would have occurred under the 2017 Final Rule because they are able to reborrow the full amount of the initial loan with the elimination of the Mandatory Underwriting Provisions in the Rule.

Increased Geographic Availability of Covered Short-Term Loans

Consumers will also have somewhat greater physical access to payday storefront locations with the elimination of the Mandatory Underwriting Provisions in the 2017 Final Rule. Using the loan volume impacts previously calculated above for storefront lenders, the Bureau forecasts that a large number of storefronts will remain open with the elimination of the Mandatory Underwriting Provisions that would have closed had the lenders been required to comply with these Provisions. However, that consumers' geographic access to stores will not be substantially increased in most areas as a result of eliminating the Mandatory Underwriting

Provisions in the 2017 Final Rule. As discussed in the 2017 Final Rule, evidence from States that have enacted laws or regulations that led to a substantial decrease in the number of stores suggest that there is usually a store that remains open near one that closes.[389] Consequently, the Bureau believes that the increase in the number of storefront locations will not substantially increase access for most consumers and the Bureau received no evidence to the contrary. The Bureau noted, however, that for consumers seeking single-payment vehicle title loans, the benefits would be far larger as the 2017 Final Rule's estimated impacts would lead to an 89 to 93 percent reduction in revenue which could affect the viability of the industry.[390]

Several industry commenters and think tank groups stated in comments in response to the 2019 NPRM that competition would increase with the elimination of the Mandatory Underwriting Provisions in the 2017 Final Rule, which, in turn, would lower costs or provide other benefits to consumers. By contrast, a consumer group stated there is no evidence of effects on non-price competition in this market and noted that the same lender typically offers the same product at different rates in different States based on the regulatory caps they face. In the 2019 NPRM, the Bureau discussed benefits to consumers from increased competition via additional storefront locations and shorter wait times. However, based on pricing differences across different State regulatory regimes and over time and the lack of evidence offered by commenters to the contrary, the Bureau concludes that this increased competition is unlikely to decrease prices for consumers, as discussed in the 2017 Final Rule's 1022(b) analysis.[391] Some industry commenters stated that innovation by banks and lenders would be higher if the Bureau

---

[389] 82 FR 54472, 54487. There may also be benefits to consumers from other "convenience factors" associated with increased competition. However, the Bureau lacks data or evidence that would allow for a conclusion that such benefits would result from this rule.

[390] *See id.* at 54817, 54834-35.

[391] *See id.* at 54834. *See also* Fekrazad, *supra*.

eliminated the Mandatory Underwriting Provisions of the 2017 Final Rule, and this innovation would further increase access and other benefits for consumers. The Bureau agrees that some lenders that would have ceased operations if the Bureau had not eliminated the Mandatory Underwriting Provisions, as suggested by some industry commenters in response to the 2016 NPRM. Such lenders may make changes to their product offerings or procedures and such changes may increase access for consumers, though the Bureau has no evidence that these lenders will do so.

b. Costs to Consumers

Relative to the 2017 Final Rule baseline, the available evidence suggests that amending the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions would impose potential costs on consumers by increasing the risks of: experiencing costs associated with extended sequences of payday loans and single-payment vehicle title loans; experiencing the effects (pecuniary and non-pecuniary) of delinquency and default on these loans; defaulting on other major financial obligations; and/or being unable to cover basic living expenses in order to pay off covered short-term and longer-term balloon-payment loans.[392] These costs are detailed below as well as in the section 1022(b)(2) analysis in the 2019 NPRM.[393] The Bureau received no new evidence that changed this analysis.

Extended Loan Sequences

Eliminating the 2017 Final Rule's limitations on making loans to borrowers who have recently had relevant covered short-term and longer-term balloon-payment loans will enable

---

[392] As mentioned previously, the effects associated with longer-term balloon-payment loans are likely to be small relative to the effects associated with payday and vehicle title loans. This is because longer-term balloon-payment loans are uncommon in the baseline against which costs are measured.

[393] 84 FR 4252, 4290-92.

borrowers to continue to borrow in these longer sequences of loans. Studies have suggested that potential consequences from such reborrowing include increases in the delays in payments on other financial obligations, involuntary checking account closures, NSF and overdraft fees, financial instability, stress and related health measures, and decreases in consumption.[394] (The elimination of the step-down structure imposed by the 2017 Final Rule's Mandatory Underwriting Provisions may have similar effects; however, the Bureau is not aware of any studies that address this possibility.)

The Bureau's synopsis of the available evidence is that access to payday loans may well be beneficial for those borrowers with discrete, short-term needs, but only if they are able to successfully avoid unanticipated long sequences of loans. As the Bureau concluded in the 2017 Final Rule, the available evidence, primarily the data from the Mann study, suggests that, while many consumers accurately predict their borrowing sequence length, consumers who end up engaging in long sequences of reborrowing generally do not anticipate those outcomes *ex ante*[395] and that the 2017 Final Rule, on average (and taking into account potential alternatives to which consumers might turn if long sequences were proscribed), is welfare enhancing for such consumers.[396] Moreover, new research discussed further below that has become available since the 2017 Final Rule provides some additional support for this conclusion.[397]

---

[394] The studies describing these results are discussed in the section 1022(b)(2) analysis of the 2017 Final Rule (82 FR 54472, 54842-46) and below. As described therein, some of these studies differentiate between shorter and longer loan sequences. The majority of studies, however, rely on access to loans as their source of variation, and cannot make such distinctions. Similarly, few of these studies distinguish between the effects of loan amount independent of sequence length.

[395] *See id.* at 54568-70, 54816-17 (discussing the Bureau's analysis of certain data from the Mann study including statistical evidence showing, in Professor Mann's words, "that there is no significant relationship between the predicted number of days and the days to clearance"); *see also* Email from Ronald Mann, Professor, Columbia Law School to Jialian Wang and Jesse Leary, Bureau of Consumer Fin. Prot. (Sept. 24, 2013) (on file).

[396] For a discussion of alternative sources of credit, *see* 82 FR 54472, 54609-11, 54841.

[397] Carvalho *et al.*, NBER Working Paper No. 26328, *supra*.

The increase in access to credit due to the elimination of the Mandatory Underwriting Provisions in the 2017 Final Rule is concentrated in long durations of indebtedness. The evidence concerning the welfare impacts on consumers who take out loans in these long sequences is limited, but suggests the welfare impacts are negative on average, meaning that the estimated effect on average consumer surplus from these extended loan sequences would be negative relative to the chosen baseline.

Several consumer groups stated in their comments in response to the 2019 NPRM that there is evidence outside of the data the Bureau cited from the Mann study showing that many consumers are not informed about the full costs of extended loan sequences and that access to extended loan sequences is not a benefit, but a cost to consumers. Another group similarly stated that the lack of effect of new disclosures in one State (Texas) does not mean consumers are well-informed about payday loans. Many industry commenters stated there is no empirical evidence that consumers are not well-informed, and several of these commenters cited the Mann study data as evidence that most borrowers are aware of the consequences of payday loans. Other industry commenters criticized the Mann study data as unrepresentative or limited and argued it could not be used to show that consumers are not well informed about payday loan borrowing. The Bureau notes that the evidence cited by commenters had been considered by the Bureau in developing the proposal, and no new data or evidence was offered to support a change in how the costs to consumers of extended loan sequences is characterized. The Bureau therefore has not changed its interpretation of the evidence as to the effect of eliminating the Mandatory Underwriting Provisions in the 2017 Final Rule for consumers in extended loan sequences.

Increased Defaults and Delinquencies

Default rates on payday loans prior to the 2017 Final Rule were fairly low when calculated on a per loan basis (2 percent in the data the Bureau analyzed).[398] A potentially more meaningful measure of the frequency with which consumers experience default is therefore the share of loan sequences that end in default—including single-loan sequences where the consumer immediately defaults and multi-loan sequences which end in default after one or more instances of reborrowing. The Bureau's data show that, using a 30-day sequence definition (*i.e.*, a loan taken within 30 days of paying off a prior loan is considered part of a sequence of borrowing), 20 percent of loan sequences ended in default prior to the 2017 Final Rule. Other researchers have found similarly high levels of default. A study of payday borrowers in Texas found that 4.7 percent of loans were charged off, but 30 percent of borrowers had a loan charged off in their first year of borrowing.[399] It is reasonable to assume a return to these market conditions under this final rule.

As previously discussed, the Bureau believes that, with the elimination of the Mandatory Underwriting Provision, some borrowers who would be able to reborrow the full amount of the initial loan may avoid a default that would have occurred if lenders had to comply with the Mandatory Underwriting Provisions. However, the Bureau believes that some borrowers taking out payday loans may experience additional defaults under this final rule than they would under the 2017 Final Rule. If eliminating the Mandatory Underwriting Provisions in the 2017 Final

---

[398] Default here is defined as a loan not being repaid as of the end of the period covered by the data or 30 days after the maturity date of the loan, whichever is later.

[399] *See* Paige Marta Skiba & Jeremy Tobacman, *Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default* (Vand. Law Sch. L. & Econ. Working Paper No. 08-33 (2008)). Note that it may not be the case that all defaulted loans were charged off.

Rule were to increase defaults on net, this will represent a potential cost to consumers.[400] However, the Bureau does not know the prevalence of the possible increased defaults nor can it provide an estimate of the total potential cost per default to consumers.[401]

In addition to default costs resulting from lenders' access to consumers' checking accounts, as noted in the 2017 Final Rule, borrowers who default may be subject to collection efforts which can take aggressive forms, including repeated phone calls, in-person visits to the consumer's home or workplace, and calls or visits to consumers' friends or relatives.[402]

Additionally, both the loss of the option value of future borrowing and non-pecuniary costs of failing to pay may add to the consumer's perception of the cost of default. The option value refers to the opportunity to borrow again in the future, at least from the specific lender, which is decreased after a default. This results in additional costs to the consumer in terms of decreased access to credit, or additional search beyond their preferred lender, that may, or may not, be accurately understood by the consumer at the time of initial borrowing. Default may also impose non-pecuniary costs, such as the loss of access to the borrower's preferred lender. In the 2019 NPRM, the Bureau sought additional information on the expected change in the prevalence of default and the costs associated therewith but did not receive any comments addressing this.

For borrowers who will take out short-term vehicle title loans under this final rule, the impacts will be greater. The range of potential ancillary impacts on a borrower from losing a vehicle to repossession depends on the transportation needs of the borrower's household and the

---

[400] For a more detailed discussion of the costs of defaults and delinquencies, as well as the reasoning behind their likely increased prevalence under this final rule, *see* 82 FR 54472, 54838.

[401] *See* Skiba & Tobacman, *supra*, for a structural model examining reborrowing behavior including potential default costs.

[402] For purposes of the section 1022(b)(2) analysis, the Bureau considers any consequences that consumers perceive as harmful to be a cost to consumers, regardless of whether collection efforts violate applicable law. 82 FR 54472, 54574.

available transportation alternatives. The Bureau received no new information in response to the 2019 NPRM on the prevalence and costs of the possible ancillary effects of repossession.

Similarly, to the extent eliminating the Mandatory Underwriting Provisions will increase the number of payday and vehicle title loans and length of loan sequences relative to the 2017 Final Rule, doing so likely will increase the frequency of delinquencies and lead consumers to incur costs associated with those delinquencies.[403] In response to the 2019 NPRM, the Bureau did not receive additional information on the total potential cost of any increased delinquencies.

One consumer group stated the Bureau understated the consequences of default (bank account closure, negative credit reporting, inability to open a new account, and vehicle repossession). The Bureau discussed these costs to consumers in its analysis and in reference to the 2017 Final Rule, while noting that it did not have data or know of any research that would allow it to quantify these effects for this analysis.[404] One think tank stated that the Bureau misstated some costs in this analysis and claimed that the repossession rates cited by the Bureau are too high. The Bureau disagrees with the argument that the repossession rates cited from prior Bureau work are incorrect. The only evidence the commenter cited regarding this claim uses a more restricted time frame for analysis, which is the likely source of the discrepancy.

c. New Evidence on the Benefits and Costs to Consumers of Access to Payday and Other Covered Short-Term and Longer-Term Balloon-Payment Loans

There have been several studies made available since the 2017 Final Rule that address the welfare effects of payday loans. The 2019 NPRM discussed several such studies.[405] Three further studies which became available since the proposal are discussed below. As noted earlier,

---

[403] 84 FR 4252, 4292.

[404] *Id.* at 4290-92.

[405] *Id.* at 4292-94.

and as discussed in the 2019 NPRM, the evidence in these studies does not alter the Bureau's views based on earlier evidence; however, it is important to include these in the discussion of the evidence that bears on the benefits and costs. The Bureau sought comment on any additional relevant research, information, or data that has arisen since the 2017 Final Rule was published.[406]

Studies of the Direct Effects of Payday Loans and Small Dollar Loan Regulations

Fekrazad (2020) evaluates changes in the payday market in Rhode Island following a decrease in the State's interest rate cap from 15 to 10 percent.[407] The author finds payday loan use increased as measured by the number of borrowers, number of loans, average loan amounts, and loan sequence lengths. While there was no change in the loan default rate, he also finds an increase in loan sequence defaults. Under some assumptions, the author also computes the welfare gain for consumers in Rhode Island due to this change and notes it is an upper bound to the extent that the some of the increase in borrowing may be driven by overborrowing due to present bias. The author also finds no change in the number of storefronts or lenders in Rhode Island after the decrease and argues this suggests lenders had market power prior to the change. The Bureau notes the consistency of the alignment between the charged and state-allowed maximum for interest rates and lack of change in lenders supports the argument that changes in physical access as a result of this final rule are unlikely to change prices consumers face for these loans.

[406] The Bureau received comments discussing in-progress, potentially relevant research, but these projects had only preliminary results, none of which had direct implications for the costs and benefits discussed in this analysis.

[407] Fekrazad, *supra*.

Studies Describing the Circumstances and Decision-making of Consumers

A recent study of consumers in Iceland shows that payday users are especially financially constrained when they take out a payday loan, though a quarter of borrowers have access to a few hundred dollars of cheaper credit.[408] They also assess the decision-making ability of consumers by characterizing how consistent their choices on incentivized survey questions are with utility maximization. They show that more than half of payday loan dollars go to borrowers who are in the bottom quintile of the decision-making ability distribution. Consumers with lower decision-making ability are also much more likely to make "financial mistakes" such as incurring NSF fees, but the study does not directly evaluate these consumers' decisions regarding the use of payday loans. Finally, the authors offer evidence that their Icelandic data align well with survey data from the U.S. to suggest that their results hold for U.S. consumers, as well.

The Allcott study surveyed borrowers at a lender in Indiana to evaluate their borrowing expectations and attitudes toward restrictions on payday lending. After exiting a payday storefront, borrowers were asked survey questions about their expected probability of borrowing another loan within the next eight weeks. On average, borrowers predicted they had a 70 percent chance of reborrowing, not far from the actual 74 percent reborrowing rate for the sample, but those who used payday loans less frequently in the six months prior to the survey were much more likely to underestimate their likelihood of reborrowing.

Most surveyed borrowers said they would "very much" like to give themselves extra motivation to avoid payday loan debt and a supermajority (about 90 percent) would at least somewhat like to give themselves extra motivation. Consistent with this response, borrowers were also willing to pay a large premium for an incentive to avoid reborrowing. Finally, the

---

[408] Carvalho *et al.*, NBER Working Paper No. 26328, *supra*.

authors use the survey responses as inputs to a model to estimate borrower awareness of present bias and consumer welfare responses to potential policy interventions. They find borrowers in their sample do put more weight on near-term payoffs, but that they are also aware of this. They use simulations to predict the effect of different restrictions on payday lending, finding that consumer welfare decreases under full payday loan bans or under caps on loan sizes, but consumer welfare slightly increases in many scenarios under a three-loan rollover restriction.

The Bureau notes that this study uses a subsample of survey respondents meeting a set of pre-registered restrictions.[409] While these conditions are mostly standard, and in most cases necessary for the main analysis in the study, at least some of the omitted borrowers would likely be classified as low decision-making ability types as in the Carvalho study.

Summary of Research Findings on the Welfare Effects of Consumers of Payday Loan Use

The Bureau believes the new research described here and in the proposal for this final rule supplements, and does not contradict, the research described in the 2017 Final Rule so the analysis presented here and in the 2019 NPRM, which is based on the assumptions detailed in the 2017 Final Rule, is unchanged.

C. Potential Benefits and Costs of the Final Rule to Consumers and Covered Persons—Recordkeeping Requirements

The 2017 Final Rule requires lenders to maintain sufficient records to demonstrate compliance with the Rule. Those requirements include, among other records to be kept, loan records; materials collected during the process of originating loans, including the information used to determine whether a borrower had the ability to repay the loan, if applicable; records of

[409] The resulting analysis subsample is 62 percent of the borrowers who completed the survey and could be matched to administrative data. The Allcott study does not provide information on how the omitted borrowers compare to the study's analysis sample, so the extent to which the study's results hold for the broader payday borrower population cannot be determined.

reporting loan information to RISes, as required; and records of attempts to withdraw payments from borrowers' accounts, and the outcomes of those attempts. The Bureau's amending the 2017 Final Rule to eliminate the Mandatory Underwriting Provisions will eliminate the recordkeeping requirements set forth in the 2017 Final Rule that are not related to payment withdrawal attempts, and therefore lenders will benefit from not having to bear these costs.

1. Benefits and Costs to Covered Persons

The Bureau estimated in the 2017 Final Rule that the costs associated with electronic storage of records was small. As such, the Bureau estimates the benefits from avoiding these costs with the elimination of the Mandatory Underwriting Provisions to be small as well, as detailed in the 2019 NPRM.[410] Lenders will also avoid the need to develop procedures and train staff to retain records in the absence of the Mandatory Underwriting Provisions; these benefits are included in earlier estimates of the benefits of no longer needing to develop procedures, upgrade systems, and train staff.

2. Benefits and Costs to Consumers

Consumers will be minimally affected by the elimination of the recordkeeping requirements in the Mandatory Underwriting Provisions.

D. Potential Benefits and Costs of the Final Rule to Consumers and Covered Persons—Requirements Related to Information Furnishing and Registered Information Systems

As discussed above, the 2017 Final Rule requires lenders to report covered short-term and longer-term balloon-payment loans to every RIS. This requirement will be eliminated as part of the elimination of the Mandatory Underwriting Provisions, as will the potential benefits and costs from the existence of, and reporting to, every RIS.

---

[410] 84 FR 4252, 4294.

1. Benefits and Costs to Covered Persons

Eliminating the Mandatory Underwriting Provisions of the 2017 Final Rule will eliminate the requirement on lenders to furnish information regarding covered short-term and longer-term balloon-payment loans to every RIS and to obtain a consumer report from at least one RIS before originating such loans. This, in turn, will eliminate the benefits, described in the 2017 Final Rule, that are afforded to firms that apply to become RISes.

Eliminating the Mandatory Underwriting Provisions of the 2017 Final Rule will also eliminate the benefits to lenders from access to RISes. Most of these benefits would result from decreased fraud and increased transparency. These benefits include, *inter alia*, easier identification of borrowers with past defaults on payday loans issued by other lenders, avoiding issuing loans to borrowers who currently have outstanding loans from other lenders, etc. This represents a cost to lenders from eliminating the Mandatory Underwriting Provisions of the 2017 Final Rule.

2. Benefits and Costs to Consumers

The elimination of the RIS-related requirements will have minimal impact on consumers. The largest benefit for consumers from the RIS-related provisions, as noted in the 2017 Final Rule, was compliance by lenders with the Rule's Mandatory Underwriting Provisions. This benefit is moot, given the elimination of the Rule's Mandatory Underwriting Provisions. The remaining benefits and costs from eliminating the Mandatory Underwriting Provisions are small.

E. Other Unquantified Benefits and Costs

Some of these impacts noted above associated with eliminating the Mandatory Underwriting Provisions in the 2017 Final Rule are difficult if not impossible to quantify, because their magnitudes or values are unknown or unknowable as described in the 2019

NPRM.[411] Additionally, there are other, less direct effects of this final rule that are also left unquantified. These impacts include (but are not limited to): intrinsic utility ("warm glow") from access to loans that are not available under the 2017 Final Rule; innovative regulatory approaches by States that would have been discouraged by the 2017 Final Rule; public and private health costs that may (or may not) result from payday loan use; suicide-related costs that may (or may not) result from increased access to loans; changes to the profitability and industry structure in response to the 2017 Final Rule (*e.g.*, industry consolidation that may create scale efficiencies, movement to installment product offerings) that will not occur under this final rule; concerns about regulatory uncertainty and/or inconsistent regulatory regimes across markets; benefits or costs to outside parties associated with the change in access to payday loans (*e.g.*, revenues of providers of payday substitutes like pawnshops, overdraft fees paid by consumers and received by financial institutions, the cost of late fees and unpaid bills, etc.); indirect costs arising from increased repossessions of vehicles in response to non-payment of title loans; non-pecuniary effects associated with financial stress that may be alleviated or exacerbated by increased access to/use of payday loans; and any impacts on lenders of fraud and opacity related to a lack of industry-wide RISes (*e.g.*, borrowers circumventing lender policies against taking multiple concurrent payday loans, lenders having more difficulty identifying chronic defaulters, etc.). In the 2019 NPRM, the Bureau asked for comments providing credible quantitative estimates of the impacts discussed above in this paragraph, but commenters did not provide such estimates or data from which the Bureau could calculate such estimates.

Consumer groups stated that the costs to consumers from eliminating the Mandatory Underwriting Provisions will be higher than stated due to health effects of payday loan use. The

[411] *Id.* at 4294-95.

Bureau noted these potential health effects in the discussion of costs to consumers above in the discussion of other unquantified benefits and costs. Further, much of the same literature noted by commenters was cited in the discussion of new research in the 2019 NPRM.[412] These costs are already considered in this analysis, though the Bureau notes that much of the research on the relationship between payday loan use and health outcomes show correlations and not causal links. Some consumer groups also stated there would additional costs due to decreased financial stability for low income families and reduced economic activity. In the 2019 NPRM, the Bureau also noted many indirect costs of payday loans in its discussion of unquantified benefits and costs.

F. Potential Impact on Depository Creditors With $10 Billion or Less in Total Assets

The Bureau believes that depository institutions and credit unions with less than $10 billion in assets are minimally constrained by the 2017 Final Rule's Mandatory Underwriting Provisions. To the limited extent depository institutions and credit unions did make loans in this market, many of those loans were conditionally exempted from the 2017 Final Rule under § 1041.3(e) or (f) as alternative or accommodation loans. As such, this final rule will have minimal impact on these institutions.

However, it is possible that the removal of the 2017 Final Rule's restrictions will allow depository institutions and credit unions with less than $10 billion in assets to develop products that are not viable under the 2017 Final Rule (subject to applicable Federal and State laws and under the supervision of their prudential regulators).[413] To the extent these products are

---

[412] *Id.* at 4293.

[413] As discussed previously, this may be even more likely than it would have been at the time the 2017 Final Rule was drafted. The OCC not only rescinded guidance on deposit advance products but has also encouraged banks to explore additional small-dollar installment lending products. Additionally, the FDIC is seeking comment on small-

developed and successfully marketed, they will represent a benefit for these institutions from the elimination of the Mandatory Underwriting Provisions in the 2017 Final Rule.

Some industry commenters stated that innovation by banks and lenders would be higher in the absence of the Mandatory Underwriting Provisions of the 2017 Final Rule. The Bureau discussed the potential benefits to small depository institutions and credit unions from increased flexibility to develop new products in the absence of the Mandatory Underwriting Provisions. Meanwhile, a few credit union commenters stated that eliminating the Mandatory Underwriting Provisions will increase relative costs for small credit unions and banks that this final rule does not cover, because they will have to continue to use tougher underwriting standards that covered lenders will no longer be required to use. Credit unions also stated they would face additional costs of competing with covered lenders since the presentation of and lack of underwriting for these covered loans makes their characteristics less transparent, making it less likely consumers will realize that installment loans offered by other lenders (such as credit unions) are potential substitutes. They also stated costs would increase for them due to account closures resulting from their members' use of covered loans. The Bureau agrees that lenders that offer competing products not covered by this final rule will face increased competition as a result of the changes made by amending the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions. The Bureau also noted there would be changes in benefits and costs to outside parties due to changes in access to payday loans, specifically noting both changes in revenues for competing products and costs related to fees. The Bureau does not, however, have evidence to suggest this will have differential costs to smaller institutions.

---

dollar products that its banks could offer. These factors might allow for additional lending if not for the 2017 Final Rule (*e.g.*, some additional product offerings may result from this final rule that would have been inviable under the 2017 Final Rule).

G. Potential Impact on Consumers in Rural Areas

With the elimination of the Mandatory Underwriting Provisions, consumers in rural areas will have a greater increase in the availability of covered short-term and longer-term balloon-payment loans originated through storefronts relative to consumers living in non-rural areas. As described above, the Bureau estimates that removing the restrictions in the 2017 Final Rule on making these loans will likely lead to a substantial increase in the markets for storefront payday loans and storefront single-payment vehicle title loans.[414] While many borrowers who live outside of Metropolitan Statistical Areas do travel somewhat far to take out a payday loan, many do not. As such, the expected increase in brick-and-mortar stores that would result from eliminating the Mandatory Underwriting Provisions should improve access to storefront payday loans for those borrowers unwilling or unable to travel greater distances for these loans. While rural borrowers for whom visiting a storefront payday lender is impracticable under the 2017 Final Rule retain the option to seek covered short-term or longer-term balloon-payment loans from online lenders, restrictions imposed by State and local law may not allow this in some jurisdictions. Additionally, not all of these would-be borrowers necessarily have access to the internet, a necessity in order to originate online loans.[415] For those consumers who are unable or unwilling to seek loans from an online lender, amending the 2017 Final Rule to eliminate its Mandatory Underwriting Provisions will provide more, and potentially more desirable, borrowing options.

---

[414] 82 FR 54472, 54853.

[415] In considering this in the 2017 Final Rule, the Bureau noted that "rural populations are less likely to have access to high-speed broadband compared to the overall population," but that "the bandwidth and speed required to access an online payday lender is minimal," and that "most potential borrowers in rural communities will likely be able to access the internet by some means (*e.g.*, dial up, or access at the public library or school)." 82 FR 54472, 54853. However, there are likely to be at least some rural borrowers that were displaced from the market by the 2017 Final Rule.

The Bureau expects that the relative impacts on rural and non-rural consumers of vehicle title loans will be similar to what would occur in the payday market. That is, rural consumers will be likely to experience a greater increase in the physical availability of single-payment vehicle title loans made through storefronts than borrowers living in non-rural areas.

Finally, the Bureau notes that it received a number of comments on the 2016 NPRM indicating that some online payday lenders operate in rural areas and comprise large shares of their local economies. Given that eliminating the Mandatory Underwriting Provisions in the 2017 Final Rule will allow these lenders to avoid decreases in loan volume and revenues, it is likely to substantially and positively affect some rural lenders, thereby benefiting their local economies.

Given the available evidence, the Bureau believes that, other than the relatively greater increase in the physical availability of covered short-term loans made through storefronts, consumers living in rural areas will not experience substantially different effects of this final rule than other consumers.[416]

Some industry commenters stated that the increase in access for rural consumers would be larger than the Bureau stated in the 2019 NPRM since rural borrowers have fewer alternatives and higher income volatility. Consumer groups similarly stated that rural borrowers have fewer alternatives due to less access to depository institutions and therefore these borrowers are more susceptible to payday lenders and suggested increased access was not a benefit. Another group stated vehicle access is especially important for rural consumers and suggested increased access

[416] In the 2017 Final Rule, the Bureau noted the potential for small effects on a few local labor markets in which online lenders comprise a significant share of employment. *Id.* Corresponding effects may result from this final rule as well. However, the specifics of these impacts would depend on the competitive characteristics of these labor markets (both as they currently exist and in the counterfactual) that are not easily discernable or generalizable and are of a second-order concern relative to the more direct impacts noted above.

to title loans was not a benefit for these consumers due to the risk of repossession. To the extent that rural payday and title borrowers have higher income volatility than other consumers, they may have fewer alternatives to these products. However, the Bureau does not have data on the income volatility of payday and title borrowers generally or by geography that it could use to evaluate this claim.

XI. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA)[417] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996[418] requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations.[419] The RFA defines a "small business" as a business that meets the size standard developed by the SBA pursuant to the Small Business Act.[420]

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[421] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to

---

[417] Public Law 96-354, 94 Stat. 1164 (1980).

[418] Public Law 104-21, sec. 241, 110 Stat. 847, 864 (1996).

[419] 5 U.S.C. 601 through 612. The term "'small organization' means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes [an alternative definition under notice and comment]." 5 U.S.C. 601(4). The term "'small governmental jurisdiction' means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes [an alternative definition after notice and comment]." 5 U.S.C. 601(5).

[420] 5 U.S.C. 601(3). The Bureau may establish an alternative definition after consulting with the SBA and providing an opportunity for public comment. *Id.*

[421] 5 U.S.C. 601 through 612.

consult with small business representatives prior to proposing a rule for which an IRFA is required.[422]

As discussed above, this final rule will revoke the Mandatory Underwriting Provisions of the 2017 Final Rule. The section 1022(b)(2) analysis above describes how this final rule will reduce the costs and burdens on covered persons, including small entities, relative to a baseline where compliance with the 2017 Final Rule becomes mandatory. Additionally, the 2017 Final Rule's FRFA contains a discussion of the specific costs and burdens imposed by the 2017 Final Rule on small entities, including those imposed by the Mandatory Underwriting Provisions that this final rule will reverse.[423] In addition to the removal of costs and burdens, all operations under current law, as well as those that would be adopted if compliance with the Mandatory Underwriting Provisions becomes mandatory, will remain available to small entities under this final rule. Thus, a small entity that is in compliance with the law will not need to take any additional action to remain in compliance. Based on these considerations, this final rule will not have a significant economic impact on any small entities.

In the 2019 NPRM, the Bureau's Director certified that the 2019 NPRM would not have a significant economic impact on a substantial number of small entities. Thus, neither an IRFA nor a small business review panel was required for the 2019 NPRM. The Bureau requested comments on its analysis and any relevant data.

Some consumer group commenters asserted that the benefits to lenders from the revocation of the Mandatory Underwriting Provisions mean that this rule has a significant

[422] 5 U.S.C. 609.

[423] 82 FR 54472, 54853.

economic impact. The Bureau does not agree that the benefits to small entities of this rule are capable of qualifying as a "significant economic impact" on a substantial number of small entities such that an IRFA and FRFA are required under the RFA.[424] That specific phrase is used several times in the RFA, and under accepted principles of statutory interpretation there is a presumption that a specific phrase bears the same meaning throughout a statutory text. Other uses of the phrase make clear that it refers to adverse effects on small entities, not benefits. For example, an IRFA must discuss alternatives considered by the agency that "minimize any significant economic impact" on small entities, and a FRFA must discuss steps taken by the agency to "minimize the significant economic impact" on small entities.[425] Congress could not have intended through the RFA to minimize benefits to small entities, and accordingly the Bureau does not believe that the benefits of this rule qualify as a significant economic impact. Further reinforcing this conclusion, the other required elements of an IRFA and FRFA generally focus on adverse effects on small entities, and none specifically focuses on benefits to small entities.[426] Thus, performing an IRFA or FRFA for a rule as a result of its benefits to small entities and not based on significant adverse effects on them would serve little purpose.

Several commenters that offer competing products not covered by the 2017 Final Rule argued this final rule will raise costs for them by increasing competition via reduced transparency for payday lenders. They further claimed that small banks and credit unions will experience increased costs due to closed deposit accounts. The Bureau believes that small

[424] 5 U.S.C. 605(b).

[425] 5 U.S.C. 603(c), 604(a)(6). *See also* 5 U.S.C. 610(a) (periodic review of rules); Public Law 96-354, sec. 2(a)(7), 94 Stat. 1164 (congressional findings).

[426] *See* 5 U.S.C. 603, 604.

entities not offering products directly covered by the 2017 Final Rule are outside of the scope of the RFA analysis for this final rule.

A few groups also offered comments related to RISes and the RFA analysis. Specifically, some consumer groups stated that payday lenders will face increased costs due to fraud in the absence of RISes. The Bureau agrees that there will be increased risk of costs due to fraud under this final rule due to the absence of the RIS requirement for all lenders, including small lenders. However, the Bureau does not believe this increased cost will be significant. Some of these consumer groups also argued that any small RISes will be negatively affected by the proposal because lenders would no longer be required to use their services. It is true that RISes, if any had come into existence, would have experienced significantly less business as a result of this final rule relative to the baseline of the 2017 Final Rule since lenders will no longer be required to report to or use these RISes. However, the Bureau believes that it is unlikely any small RISes would have existed under the 2017 Final Rule as the scale involved in efficiently collecting, maintaining, and sharing data would not be conducive to a small business as seen in the market with other credit reporting systems. Finally, several industry commenters and State legislators supported the Bureau's proposed rule stating that the 2017 Final Rule would have resulted in the closure of many small businesses due to revenue decreases or increased costs related to training or the use of RISes. The Bureau agrees that small lenders will experience a reduction in costs and training related to the use of RISes which may avoid the closure of some small lenders. The Bureau generally agrees with these comments, but because these costs to small entities are either not significant or do not apply to persons covered by the 2017 Final Rule, the Bureau's certification still holds.

Accordingly, the Director of the Bureau hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Thus, a FRFA is not required for this final rule.

XII. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA),[427] Federal agencies are generally required to seek Office of Management and Budget (OMB) approval for information collection requirements prior to implementation. Under the PRA, the Bureau may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to, an information collection, unless the information collection displays a valid control number assigned by OMB. This final rule revokes the mandatory underwriting requirements of 12 CFR part 1041; thereby removing the information collection requirements previously contained in §§ 1041.5, 1041.6, 1041.10, and 1041.11. The Bureau is continuing to seek OMB approval for the information collection requirements remaining in 12 CFR part 1041 concerning the Payment Provisions as contained in §§ 1041.8, 1041.9, and 1041.12. As noted in the 2019 NPRM, the collections of information related to the 2017 Final Rule (concerning both the Mandatory Underwriting Provisions and the Payment Provisions) were submitted to OMB in 2017 in accordance with the PRA and assigned OMB Control Number 3170-0065 for tracking purposes. That control number is not active because OMB has not acted on those information collection requests. The Bureau has submitted a revised information collection request seeking a new OMB control number for the provisions of 12 CFR part 1041 not affected by this final rule for OMB review under PRA section 3507(d). This submission to OMB was made under OMB Control Number 3170-0071, which OMB assigned for tracking purposes at the 2019 NPRM

[427] 44 U.S.C. 3501 *et seq.*

stage of this rulemaking. The Bureau will publish a separate *Federal Register* notice once OMB concludes its review of this request.

When the 2019 NPRM was published, the Bureau invited comment on: (a) whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) the accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. The Bureau did not receive comments concerning these specific topics.

The Bureau did receive two other comments that addressed PRA matters other than the four topics on which the Bureau requested comment. First, consumer groups stated it was improper for the Bureau to request comments on the PRA information collection request with respect to the Payment Provisions since the proposal did not address payments. The Bureau agrees with this comment.

In the second comment made by these groups, they stated that there is implied OMB approval for the Payment Provisions data collections for the 2017 Final Rule. Because the Payment Provisions are outside the scope of this rulemaking, the extent to which the Bureau can infer OMB approval by OMB's inaction on the information collection requirements in the 2017 Final Rule is an issue that is beyond the scope of this rulemaking.[428]

[428] The comments are correct that there is a provision in the OMB regulations pertaining to information collection requests for an agency to request that OMB issue a control number if OMB has not acted on an information collection request within the time limits that are established in the OMB regulations. The PRA does not, however, provide for an "inferred OMB approval." Rather, the PRA generally provides that if OMB does not act on an

XIII. Congressional Review Act

Pursuant to the Congressional Review Act,[429] the Bureau will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States at least 60 days prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this rule as a "major rule" as defined by 5 U.S.C. 804(2).

XIV. Signing Authority

The Director of the Bureau, having reviewed and approved this document, is delegating the authority to electronically sign this document to Grace Feola, a Bureau Federal Register Liaison, for purposes of publication in the *Federal Register*.

List of Subjects in 12 CFR Part 1041

Banks, Banking, Consumer protection, Credit, Credit unions, National banks, Reporting and recordkeeping requirements, Savings associations, Trade practices.

Authority and Issuance

For the reasons set forth above, the Bureau amends 12 CFR part 1041, as set forth below:

PART 1041—PAYDAY, VEHICLE TITLE, AND CERTAIN HIGH-COST INSTALLMENT LOANS

1. The authority citation for part 1041 continues to read as follows:

Authority: 12 U.S.C. 5511, 5512, 5514(b), 5531(b), (c), and (d), 5532.

---

information collection request within 60 days, an agency may request that OMB "assign an OMB control number." 5 CFR 1320.11(i). However, the duration for the period during which the Bureau may collect information is within OMB's discretion, and in the end, the Bureau did not need to invoke this provision of the OMB regulations. The Bureau will work with OMB when the information collections for the Payment Provisions become operative in order to ensure compliance with the PRA.

[429] 15 U.S.C. 801 *et seq.*

Subpart A—General

§ 1041.1 [Amended]

2. Amend § 1041.1 by removing the last sentence of paragraph (b).

§ 1041.2 [Amended]

3. Amend § 1041.2 by removing and reserving paragraphs (a)(14) and (19).

Subpart B—[Removed and Reserved]

4. Remove and reserve subpart B, consisting of §§ 1041.4 through 1041.6.

5. Revise the heading for subpart D to read as follows:

Subpart D—Recordkeeping, Anti-Evasion, Severability, and Dates

§§ 1041.10 and 1041.11 [Removed and Reserved]

6. Remove and reserve §§ 1041.10 and 1041.11.

7. Amend § 1041.12 by revising paragraph (b)(1) and removing and reserving paragraphs (b)(2) and (3) to read as follows:

§ 1041.12 Compliance program and record retention

* * * * *

(b) * * *

(1) *Retention of loan agreement for covered loans.* To comply with the requirements in this paragraph (b), a lender must retain or be able to reproduce an image of the loan agreement for each covered loan that the lender originates.

§ 1041.15 [Amended]

8. Amend § 1041.15 by removing paragraph (d).

* * * * *

9. In appendix A to part 1041, remove and reserve Model Forms A-1 and A-2.

Appendix A to Part 1041—Model Forms

A-1 Model Form

[Reserved]

A-2 Model Form

[Reserved]

10. In supplement I to part 1041:

a. Under *Section 1041.2—Definitions,* revise *2(a)(5) Consummation* and remove *2(a)(19) Vehicle Security.*

b. Under *Section 1041.3—Scope of Coverage; Exclusions; Exemptions*, revise *3(e)(2) Borrowing History Condition* and *3(e)(3) Income Documentation Condition*.

c. Remove *Section 1041.4—Identification of Unfair and Abusive Practice*, *Section 1041.5—Ability-to-Repay Determination Required*, *Section 1041.6—Conditional Exemption for Certain Covered Short-Term Loans*, *Section 1041.10—Furnishing Information to Registered Information Systems*, and *Section 1041.11—Registered Information Systems*.

d. In *Section 1041.12—Compliance Program and Record Retention*:

i. Revise *12(a) Compliance Program* and *12(b) Record Retention*.

ii. Remove *12(b)(1) Retention of Loan Agreement and Documentation Obtained in Connection With Originating a Covered Short-Term or Covered Longer-Term Balloon-Payment Loan*, *12(b)(2) Electronic Records in Tabular Format Regarding Origination Calculations and Determinations for a Covered Short-Term or Longer-Term Balloon-Payment Loan Under § 1041.5*, *12(b)(3) Electronic Records in Tabular Format Regarding Type, Terms, and Performance of Covered Short-Term or Covered Longer-Term Balloon-Payment Loans*, and *Paragraph 12(b)(3)(iv)*.

iii. Revise *12(b)(5) Electronic Records in Tabular Format Regarding Payment Practices for Covered Loans*.

The revisions read as follows:

Supplement I to Part 1041—Official Interpretations

Section 1041.2—Definitions

* * * * *

2(a)(5) Consummation

1. *New loan.* When a contractual obligation on the consumer's part is created is a matter to be determined under applicable law. A contractual commitment agreement, for example, that under applicable law binds the consumer to the loan terms would be consummation. Consummation, however, does not occur merely because the consumer has made some financial investment in the transaction (for example, by paying a non-refundable fee) unless applicable law holds otherwise.

* * * * *

Section 1041.3—Scope of Coverage; Exclusions; Exemptions

* * * * *

3(e) Alternative Loans

* * * * *

3(e)(2) Borrowing History Condition

1. *Relevant records.* A lender may make an alternative covered loan under § 1041.3(e) only if the lender determines from its records that the consumer's borrowing history on alternative covered loans made under § 1041.3(e) meets the criteria set forth in § 1041.3(e)(2). The lender is not required to obtain information about a consumer's borrowing history from other persons, such as by obtaining a consumer report.

2. *Determining 180-day period.* For purposes of counting the number of loans made under § 1041.3(e)(2), the 180-day period begins on the date that is 180 days prior to the consummation date of the loan to be made under § 1041.3(e) and ends on the consummation date of such loan.

3. *Total number of loans made under § 1041.3(e)(2).* Section 1041.3(e)(2) excludes loans from the conditional exemption in § 1041.3(e) if the loan would result in the consumer being indebted on more than three outstanding loans made under § 1041.3(e) from the lender in any consecutive 180-day period. *See* § 1041.2(a)(17) for the definition of outstanding loan. Under § 1041.3(e)(2), the lender is required to determine from its records the consumer's borrowing history on alternative covered loans made under § 1041.3(e) by the lender. The lender must use this information about borrowing history to determine whether the loan would result in the consumer being indebted on more than three outstanding loans made under § 1041.3(e) from the lender in a consecutive 180-day period, determined in the manner described in comment 3(e)(2)-2. Section 1041.3(e) does not prevent lenders from making a covered loan subject to the requirements of this part.

4. *Example.* For example, assume that a lender seeks to make an alternative loan under § 1041.3(e) to a consumer and the loan does not qualify for the safe harbor under § 1041.3(e)(4). The lender checks its own records and determines that during the 180 days preceding the consummation date of the prospective loan, the consumer was indebted on two outstanding loans made under § 1041.3(e) from the lender. The loan, if made, would be the third loan made under § 1041.3(e) on which the consumer would be indebted during the 180-day period and, therefore, would be exempt from this part under § 1041.3(e). If, however, the lender determined that the consumer was indebted on three outstanding loans under § 1041.3(e) from the lender during the

180 days preceding the consummation date of the prospective loan, the condition in § 1041.3(e)(2) would not be satisfied and the loan would not be an alternative loan subject to the exemption under § 1041.3(e) but would instead be a covered loan subject to the requirements of this part.

3(e)(3) Income Documentation Condition

1. *General.* Section 1041.3(e)(3) requires lenders to maintain policies and procedures for documenting proof of recurring income and to comply with those policies and procedures when making alternative loans under § 1041.3(e). For the purposes of § 1041.3(e)(3), lenders may establish any procedure for documenting recurring income that satisfies the lender's own underwriting obligations. For example, lenders may choose to use the procedure contained in the National Credit Union Administration's guidance at 12 CFR 701.21(c)(7)(iii) on Payday Alternative Loan programs recommending that Federal credit unions document consumer income by obtaining two recent paycheck stubs.

* * * * *

Section 1041.12—Compliance Program and Record Retention

12(a) Compliance Program

1. *General.* Section 1041.12(a) requires a lender making a covered loan to develop and follow written policies and procedures that are reasonably designed to ensure compliance with the applicable requirements in this part. These written policies and procedures must provide guidance to a lender's employees on how to comply with the requirements in this part. In particular, under § 1041.12(a), a lender must develop and follow detailed written policies and procedures reasonably designed to achieve compliance, as applicable, with the payments requirements in §§ 1041.8 and 1041.9. The provisions and commentary in each section listed

above provide guidance on what specific directions and other information a lender must include in its written policies and procedures.

12(b) Record Retention

1. *General.* Section 1041.12(b) requires a lender to retain various categories of documentation and information concerning payment practices in connection with covered loans. The items listed are non-exhaustive as to the records that may need to be retained as evidence of compliance with this part.

* * * * *

12(b)(5) Electronic Records in Tabular Format Regarding Payment Practices for Covered Loans

1. *Electronic records in tabular format.* Section 1041.12(b)(5) requires a lender to retain records regarding payment practices in electronic, tabular format. Tabular format means a format in which the individual data elements comprising the record can be transmitted, analyzed, and processed by a computer program, such as a widely used spreadsheet or database program. Data formats for image reproductions, such as PDF, and document formats used by word processing programs are not tabular formats.

* * * * *

Dated: July 7, 2020.

/s/ Grace Feola

Grace Feola,

Federal Register Liaison, Bureau of Consumer Financial Protection.