

MEMORANDUM

To: InstallmentLaw Subscribers

From: Hudson Cook, LLP

Date: February 22, 2019

Subject: CFPB Final Rule on Short-Term Loans and Certain Installment Loans

On February 6, 2019, the Consumer Financial Protection Bureau proposed to rescind (the “2019 NPRM”) certain provisions of the November 2017 Rule governing Payday, Vehicle Title, and Certain High-Cost Installment Loans (the “2017 Final Rule”). The Bureau also proposed, in a separate NPRM, to delay the August 19, 2019 compliance date of certain portions of the 2017 Final Rule (the “Compliance Date NPRM”).

The 2017 Final Rule imposed limitations on (i) short-term consumer loans, (ii) longer-term consumer installment loans with balloon payments, and (iii) higher-rate consumer installment loans repayable by a payment authorization. The 2017 Final Rule required lenders originating short-term loans and longer-term balloon payment loans to evaluate whether each consumer has the ability to repay the loan along with current obligations and expenses. The 2017 Final Rule also curtailed repeated unsuccessful attempts to debit consumers’ accounts for short-term loans, balloon payment loans, and installment loans that involve a payment authorization and an APR over 36%.

The Compliance Date NPRM would delay the compliance date for the Mandatory Underwriting Provisions of the 2017 Final Rule by 15 months to November 19, 2020.

There are two key dates regarding the 2019 NPRM and the Compliance Date NPRM. Comments and responses to the Bureau’s 16 questions regarding the 2019 NPRM are due **May 15, 2019**. Comments and questions to the Bureau’s 7 questions regarding the Compliance Date NPRM are due **March 18, 2019**.

This memorandum contrasts the 2019 NPRM and the 2017 Final Rule. Additionally, this memorandum outlines the requirements of the Payment Provisions in further detail.

“Covered Loans”: NOT CHANGED

The 2017 Final Rule addressed the following types of loans: (i) “short-term” consumer loans with a term of 45 days or less; (ii) “longer-term” consumer balloon-payment loans; and (iii) “longer-term” consumer loans that exceed 45 days where the rate exceeds a 36% annual percentage rate as defined under the Truth in Lending Act and where the lender obtained a leveraged payment mechanism (collectively “Covered Loans”).¹ The Rule

¹ Like the 2017 Final Rule, the 2019 NPRM excludes the following types of loans from coverage: Purchase money loans

defines “leveraged payment mechanism” to mean the right to initiate a transfer of money through any means from a consumer’s account, as defined by the Electronic Funds Transfer Act. A leveraged payment mechanism does not include a single payment transfer initiated at the consumer’s request. Types of leveraged payment mechanisms include checks, drafts or similar payment instruments written by the consumer, electronic fund transfer authorizations (including debit card authorizations), remotely created checks, remotely created payment orders, and transfers by account-holding institutions.

These designations remain unchanged in the 2019 NPRM. Those making “covered loans” will be required to comply with the Payment Provisions as outlined below.

Substantive Requirements – Ability to Repay: PROPOSED RECISSION

The 2017 Final Rule required lenders to verify the consumer had the “ability to repay” before originating short-term loans and longer-term balloon-payment loans. The failure to determine a consumer’s ability to repay either a short-term loan or a longer-term balloon-payment loan was considered an unfair and abusive practice.

The 2019 NPRM proposes to repeal the “ability to repay” requirement in its entirety. The Compliance Date NPRM proposes to delay the compliance date of this provision by 15 months to allow the Bureau to finish the 2019 NPRM process.

Payments: NOT CHANGED

Like the 2017 Final Rule, under the 2019 NPRM, section 1041.7 addresses repayment of three types of loan products: (i) short-term loans; (ii) longer-term balloon-payment loans; and (iii) longer-term loans with an APR of 36% repayable through a leveraged payment mechanism.

The 2019 NPRM proposes to retain the Payment Provisions in their entirety, without revision. Further, the compliance date for the payment provisions remains the same – lenders are expected to comply with these provisions beginning August 19, 2019.

First Payment Withdrawal Notice:

Prior to initiating the first payment withdrawal from a consumer's account, a lender must provide to the consumer a payment notice.

“First Payment Withdrawal” Defined:

“First payment withdrawal” means the first payment transfer scheduled to be initiated by a lender for a particular covered loan, not including a single immediate payment transfer initiated at the consumer's request.

Delivery and Timing Requirements:

(expressly limited to the cost of the goods and does not include refinances of a purchase money loan); Real estate-secured credit, including home mortgages and credit secured by personal property used as a dwelling; Credit cards; Student loans, both federal and private; Non-recourse pawn loans; Overdraft services and lines of credit; and Business-Purpose Loans. The 2019 NPRM also continues to exclude the following types of loans: Wage advance programs; and No-Cost Advances. “Alternative loans” and “Accommodation loans” are also conditionally exempt from the coverage of the 2019 NPRM.

If the lender provides the first payment withdrawal notice by mail, the lender must mail the notice no earlier than when the lender obtains payment authorization and no later than six business days prior to initiating the transfer. If the lender provides the first payment withdrawal notice through electronic delivery, the lender must send the notice no earlier than when the lender obtains payment authorization and no later than three business days prior to initiating the transfer. If the lender provides the first payment withdrawal notice in person, the lender must provide the notice no earlier than when the lender obtains payment authorization and no later than three business days prior to initiating the transfer.

Notice Content Requirements:

The notice must contain the following information and statements, as applicable, using language substantially similar to the language set forth in [Model Form A-3](#) in [appendix A](#) to the Rule:

- **Identifying statement.** The statement, “Upcoming Withdrawal Notice,” using that phrase, and, in the same statement, the name of the lender providing the notice.
- **Transfer terms—**
 - **Date.** Date that the lender will initiate the transfer.
 - **Total Payment Amount.** Dollar amount of the transfer.
 - **Consumer account.** Sufficient information to permit the consumer to identify the account from which the funds will be transferred. The lender must not provide the complete account number of the consumer, but may use a truncated version similar to [Model Form A-3](#) in [appendix A](#) to the Rule.
 - **Loan identification information.** Sufficient information to permit the consumer to identify the covered loan associated with the transfer.
 - **Payment channel.** Payment channel of the transfer.
 - **Check number.** If the transfer will be initiated by a signature or paper check, remotely created check, or remotely created payment order, the check number associated with the transfer.
- **Payment breakdown.** In a tabular form:
 - **Payment breakdown heading.** A heading with the statement “Payment Breakdown,” using that phrase.
 - **Principal.** The amount of the payment that will be applied to principal.
 - **Interest.** The amount of the payment that will be applied to accrued interest on the loan.
 - **Fees.** If applicable, the amount of the payment that will be applied to fees.
 - **Other charges.** If applicable, the amount of the payment that will be applied to other charges.
 - **Total Payment Amount.** The statement “Total Payment Amount,” using that phrase, and the total dollar amount of the payment.
 - **Explanation of interest-only or negatively amortizing payment.** If applicable, a statement explaining that the payment will not reduce principal, using the applicable phrase “When you make this payment, your principal balance will stay the same and you will not be closer to paying off your loan” or “When you make this payment, your principal balance will increase and you will not be closer to paying off your loan.”
- **Lender name and contact information.** Name of the lender, the name under which the transfer will be initiated (if different from the consumer-facing name of the lender), and two different forms of lender contact information that may be used by the consumer to obtain information about the consumer's loan.

If the consumer has consented to receive disclosures through electronic delivery, the lender may provide the

first payment withdrawal notice electronically. However, the lender also must provide the applicable short electronic notice.

The first payment withdrawal electronic short notice must contain the following information and statements, as applicable, in a form substantially similar to [Model Clause A-6](#) in [appendix A](#) to the Rule:

- **Identifying statement.** Identifying statement for first payment withdrawal notice and identifying statement for unusual payment withdrawal notice.
- **Transfer terms—**
 - **Date.** The date the lender will initiate the transfer.
 - **Dollar amount of the transfer.**
 - **Consumer account.** Sufficient information to permit the consumer to identify the account from which the funds will be transferred. The lender must not provide the complete account number of the consumer, but may use a truncated version similar to [Model Form A-3](#) in [appendix A](#) to the Rule.
- **Web site URL.** When the full notice is being provided through a linked URL rather than as a PDF attachment, the unique URL of a Web site that the consumer may use to access the full [first payment withdrawal notice](#).

Unusual Withdrawal Notice:

Prior to initiating an unusual withdrawal from a consumer's account, a lender must provide to the consumer a payment notice.

“Unusual Withdrawal” Defined:

“Unusual withdrawal” means a payment transfer that meets one or more of the following conditions:

- **Varying amount.** If the amount of a transfer will vary in amount from the regularly scheduled payment amount, a statement that the transfer will be for a larger or smaller amount than the regularly scheduled payment amount, as applicable.
- **Date other than date of regularly scheduled payment.** If the payment transfer date is not a date on which a regularly scheduled payment is due under the terms of the loan agreement, a statement that the transfer will be initiated on a date other than the date of a regularly scheduled payment.
- **Different payment channel.** If the payment channel will differ from the payment channel of the transfer directly preceding it, a statement that the transfer will be initiated through a different payment channel and a statement of the payment channel used for the prior transfer.
- **For purpose of re-initiating returned transfer.** If the transfer is for the purpose of re-initiating a returned transfer, a statement that the lender is re-initiating a returned transfer, a statement of the date and amount of the previous unsuccessful attempt, and a statement of the reason for the return.

Delivery and Timing Requirements:

If the lender provides the unusual withdrawal notice by mail, the lender must mail the notice no earlier than 10 business days and no later than six business days prior to initiating the transfer. If the lender provides the unusual withdrawal notice through electronic delivery, the lender must send the notice no earlier than seven business days and no later than three business days prior to initiating the transfer. If the lender provides the unusual withdrawal notice in person, the lender must provide the notice no earlier than seven business days

and no later than three business days prior to initiating the transfer.

Notice Content Requirements:

The unusual withdrawal notice must contain the following information and statements, as applicable, using language substantially similar to the language set forth in [Model Form A-4](#) in [appendix A](#) to the Rule:

- **Identifying statement.** The statement, “Alert: Unusual Withdrawal,” using that phrase, and, in the same statement, the name of the lender that is providing the notice.
- **Basic payment information.** The following content:
 - **Transfer terms.**
 - **Date.** Date that the lender will initiate the transfer.
 - **Total Payment Amount.** Dollar amount of the transfer.
 - **Consumer account.** Sufficient information to permit the consumer to identify the account from which the funds will be transferred. The lender must not provide the complete account number of the consumer, but may use a truncated version similar to [Model Form A-4](#) in [appendix A](#) to the Rule.
 - **Loan identification information.** Sufficient information to permit the consumer to identify the covered loan associated with the transfer.
 - **Payment channel.** Payment channel of the transfer.
 - **Check number.** If the transfer will be initiated by a signature or paper check, remotely created check, or remotely created payment order, the check number associated with the transfer.
 - **Payment breakdown.** In a tabular form:
 - **Payment breakdown heading.** A heading with the statement “Payment Breakdown,” using that phrase.
 - **Principal.** The amount of the payment that will be applied to principal.
 - **Interest.** The amount of the payment that will be applied to accrued interest on the loan.
 - **Fees.** If applicable, the amount of the payment that will be applied to fees.
 - **Other charges.** If applicable, the amount of the payment that will be applied to other charges.
 - **Total Payment Amount.** The statement “Total Payment Amount,” using that phrase, and the total dollar amount of the payment.
 - **Explanation of interest-only or negatively amortizing payment.** If applicable, a statement explaining that the payment will not reduce principal, using the applicable phrase “When you make this payment, your principal balance will stay the same and you will not be closer to paying off your loan” or “When you make this payment, your principal balance will increase and you will not be closer to paying off your loan.”
 - **Lender name and contact information.** Name of the lender, the name under which the transfer will be initiated (if different from the consumer-facing name of the lender), and two different forms of lender contact information that may be used by the consumer to obtain information about the consumer's loan.
- **Description of unusual withdrawal.** The following content, as applicable, in a form substantially similar to the form in [Model Form A-4](#) in [appendix A](#) to this part:
 - **Varying amount.** If the amount of a transfer will vary in amount from the regularly scheduled payment amount, a statement that the transfer will be for a larger or smaller amount than the regularly scheduled payment amount, as applicable.

- **Date other than date of regularly scheduled payment.** If the payment transfer date is not a date on which a regularly scheduled payment is due under the terms of the loan agreement, a statement that the transfer will be initiated on a date other than the date of a regularly scheduled payment.
- **Different payment channel.** If the payment channel will differ from the payment channel of the transfer directly preceding it, a statement that the transfer will be initiated through a different payment channel and a statement of the payment channel used for the prior transfer.
- **For purpose of re-initiating returned transfer.** If the transfer is for the purpose of re-initiating a returned transfer, a statement that the lender is re-initiating a returned transfer, a statement of the date and amount of the previous unsuccessful attempt, and a statement of the reason for the return.

If the consumer has consented to receive disclosures through electronic delivery, the lender may provide the unusual payment withdrawal notice electronically. However, the lender also must provide the applicable short electronic notice.

The unusual withdrawal electronic short notice must contain the following information and statements, using language substantially similar to the language in [Model Clause A-7](#) in [appendix A](#) to the Rule:

- **Identifying statement.** Identifying statement for first payment withdrawal notice and identifying statement for unusual payment withdrawal notice.
- **Transfer terms—**
 - **Date.** The date the lender will initiate the transfer.
 - **Dollar amount of the transfer.**
 - **Consumer account.** Sufficient information to permit the consumer to identify the account from which the funds will be transferred. The lender must not provide the complete account number of the consumer, but may use a truncated version similar to [Model Form A-4](#) in [appendix A](#) to the Rule.
- **Web site URL.** When the full notice is being provided through a linked URL rather than as a PDF attachment, the unique URL of a Web site that the consumer may use to access the full [unusual payment withdrawal notice](#).
- **Varying amount,** If the amount of a transfer will vary in amount from the regularly scheduled payment amount, a statement that the transfer will be for a larger or smaller amount than the regularly scheduled payment amount, as applicable.
- **Date other than due date of regularly scheduled payment,** If the payment transfer date is not a date on which a regularly scheduled payment is due under the terms of the loan agreement, a statement that the transfer will be initiated on a date other than the date of a regularly scheduled payment.
- **Different payment channel,** If the payment channel will differ from the payment channel of the transfer directly preceding it, a statement that the transfer will be initiated through a different payment channel and a statement of the payment channel used for the prior transfer.

Two Bites at the Apple:

The 2019 NPRM generally deems further attempts to withdraw payment from a consumer's account following two sequential payment returns for insufficient funds to be an abusive and unfair practice, with few exceptions. Once two account debits in a row are returned unpaid, the lender must obtain a new express consent to further debits. The 2019 NPRM applies to all account access methods, including ACH and paper checks.

After a lender initiates two consecutive failed payment transfers from a consumer's account, the lender must provide to the consumer a consumer rights notice in accordance with the requirements of the [consumer rights notice required by §1041.9\(c\)](#). The lender must send the notice no later than three business days after it receives information that the second consecutive attempt has failed. The notice must contain the following information and statements, using language substantially similar to the language set forth in [Model Form A-5](#) in [appendix A](#) to the Rule:

- **Identifying statement.** A statement that the lender, identified by name, is no longer permitted to withdraw loan payments from the consumer's account.
- **Last two attempts were returned.** A statement that the lender's last two attempts to withdraw payment from the consumer's account were returned due to non-sufficient funds, or, if applicable to payments initiated by the consumer's account-holding institution, caused the account to go into overdraft status.
- **Consumer account.** Sufficient information to permit the consumer to identify the account from which the unsuccessful payment attempts were made. The lender must not provide the complete account number of the consumer, but may use a truncated version similar to [Model Form A-5](#) in [appendix A](#) to the Rule.
- **Loan identification information.** Sufficient information to permit the consumer to identify any covered loans associated with the unsuccessful payment attempts.
- **Statement of Federal law prohibition.** A statement, using that phrase, that in order to protect the consumer's account, Federal law prohibits the lender from initiating further payment transfers without the consumer's permission.
- **Contact about choices.** A statement that the lender may be in contact with the consumer about payment choices going forward.
- **Previous unsuccessful payment attempts.** In a tabular form:
 - **Previous payment attempts heading.** A heading with the statement “previous payment attempts.”
 - **Payment due date.** The scheduled due date of each previous unsuccessful payment transfer attempted by the lender.
 - **Date of attempt.** The date of each previous unsuccessful payment transfer initiated by the lender.
 - **Amount.** The amount of each previous unsuccessful payment transfer initiated by the lender.
 - **Fees.** The fees charged by the lender for each unsuccessful payment attempt, if applicable, with an indication that these fees were charged by the lender.
- **CFPB information.** A statement, using that phrase, that the Consumer Financial Protection Bureau created this notice, a statement that the CFPB is a Federal government agency, and the URL to www.consumerfinance.gov/payday-rule. This statement must be the last piece of information provided in the notice.

When sending the consumer rights notice electronically, the lender must also send the electronic short consumer rights notice. The notice must contain the following information and statements, as applicable, using language substantially similar to the language set forth in [Model Clause A-8](#) in [appendix A](#) to the Rule:

- **Identifying statement.** A statement that the lender, identified by name, is no longer permitted to withdraw loan payments from the consumer's account.
- **Last two attempts were returned.** A statement that the lender's last two attempts to withdraw payment from the consumer's account were returned due to non-sufficient funds, or, if applicable to payments initiated by the consumer's account-holding institution, caused the account to go into overdraft status.

- **Consumer account.** Sufficient information to permit the consumer to identify the account from which the unsuccessful payment attempts were made. The lender must not provide the complete account number of the consumer, but may use a truncated version similar to [Model Form A-5](#) in [appendix A](#) to the Rule.
- **Statement of Federal law prohibition.** A statement, using that phrase, that in order to protect the consumer's account, Federal law prohibits the lender from initiating further payment transfers without the consumer's permission.
- **Web site URL.** When the full notice is being provided through a linked URL rather than as a PDF attachment, the unique URL of a Web site that the consumer may use to access the full [consumer rights notice required by §1041.9\(c\)](#).

Registered Information Systems: PROPOSED RECISSION

The 2017 Final Rule created a specialty credit reporting mechanism called “registered information systems,” defined as consumer reporting agencies that meet certain criteria and register with the CFPB. The 2017 Final Rule required lenders to furnish information to these “registered information systems” about certain Covered Loans and borrowers at origination, over the life of the loan, and when the loan is no longer outstanding.

The 2019 NPRM repeals the provisions regarding “registered information systems.” The Compliance Date NPRM proposes to delay the compliance date of this provision by 15 months to allow the Bureau to finish the 2019 NPRM process.

Compliance Program and Recordkeeping: SOME CHANGES

Like the 2017 Final Rule, the 2019 NPRM requires lenders to establish and follow a compliance program reasonably designed to ensure that the lender complies with the requirements in the Rule. Further, the lender must comply with certain recordkeeping requirements for Covered Loans, including retaining the loan agreement, leveraged payment mechanism(s), authorization of additional payment transfer, and underlying one-time electronic transfer authorization or underlying signature check for 36 months after the last activity on the account. Electronic records regarding payment practices must be maintained in a tabular format readily accessible to Bureau examiners.

For additional information, please contact:

Catherine Brennan	410.865.5405
Hurshell Brown	682.350.9151
Justin Hosie	423.490.7564
Blake Sims	423.490.7563
Dailey Wilson	423.490.7567