



January 18, 2019

Hon. Kathleen Kraninger
Director
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

**Re: Operational Hardships Imposed by Payments Restrictions in Payday,
Vehicle Title, and Certain High-Cost Installment Loans Rule**

Dear Ms. Kraninger:

The Online Lenders Alliance (“OLA”)¹ writes to congratulate you on your confirmation as Director of the Bureau of Consumer Financial Protection (“CFPB” or “Bureau”) and to provide our perspective on the operational hardships that would result from the payments provisions of the Bureau’s rule regarding Payday, Vehicle Title, and Certain High-Cost Installment Loans (the “Small Dollar Rule” or “Rule”).

We applaud the CFPB for committing to revisit the Small Dollar Rule’s ability-to-repay provisions. The ability-to-repay provisions are overly prescriptive and burdensome as compared to similar type products i.e. The CARD Act which are much simpler and more flexible. In addition, this provision would choke off access to credit for consumers who need it most, and present a host of other legal and policy issues discussed in our October 2016 letter commenting on the proposed Small Dollar Rule.²

We urge the Bureau to revisit the Rule’s payments provisions as well. Not only do they rest on unsound analysis,³ the payments provisions would impose substantial operational hardships on

¹ OLA represents the growing industry of innovative companies offering online consumer loans and related products and services. OLA members include online lenders, and vendors and service providers to lenders, such as consumer reporting agencies. Our members that are lenders mostly provide unsecured installment loans to millions of American consumers, a much-needed credit product for consumers who do not have other realistic or safe options to meet unexpected or emergency expenses or to make ends meet when money is tight. These loans provide convenience that consumers value.

² See Online Lenders Alliance, [OLA Files Comment Letter on Small Dollar Lending Rule to CFPB](#) (Oct. 7, 2016).

³ Our October 2016 comment letter explains in detail how the payments provisions are based on outdated evidence that predates National Automated Clearinghouse Association (“NACHA”) rules setting return thresholds and prohibiting payment splitting and re-presentments. These provisions are also unnecessary in light of Regulation E requirements that allow consumers to revoke authorizations, stop payments, or charge back payments and forbid lenders from conditioning credit on consumers’ agreement to authorize recurring debt. We would be pleased to discuss those issues with you in more depth.

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consumers. To avoid imposing these hardships, the CFPB should repeal the payments provisions or at least reopen them for public comment to gather additional evidence and viewpoints.

I. The Small Dollar Rule's Requirements to Obtain Reauthorization for Payments Will Frustrate Consumers' Reasonable Expectations and Result in Loans Going into Collections, Imposing Operational Hardships on Consumers

Authorization of recurring payments is a convenience to the consumer. Millions of consumers choose automatic debits to pay mortgages, credit card balances, insurance premiums, condo fees, phone, internet, and cable bills, as well as small dollar loans. This widespread consumer use of automatic recurring debits demonstrates that consumers understand how such automated repayment features work and find them more convenient and, in many cases, less costly than alternatives.⁴ Consumers want and expect the option to authorize automatic recurring payments to lenders, as they do with many other financial and non-financial products.

In particular, consumers expect that when they authorize recurring debits from their accounts, their authorizations are valid and will not be dishonored by lenders. We know of no other financial or non-financial product that is subject to a regulatory requirement to obtain payment re-authorization after a particular number of failed attempts. Borrowers are not likely to understand or appreciate the inconvenience of having to do so only for covered loans as a result of the Rule's payments provisions.

Moreover, the unexpected and unilateral revocations of borrowers' payment authorizations resulting from the Small Dollar Rule's payments provisions would accelerate the very harms the Rule seeks to alleviate. Nothing in the Rule *requires* the lender to send a payment reauthorization request. The lender may simply proceed to collections after two failed attempts at withdrawing payments, and many lenders may do just that. Those lenders that seek to obtain payment reauthorization from a borrower in a timely manner may receive no response, even if the borrower intends to make a payment. For example:

- the borrower may not understand or respond to the request, given her prior authorization;
- the borrower may not notice the request;
- work demands may leave the borrower unable to contact the lender during business hours;
- the borrower may be traveling; or
- the borrower may not be able to find an alternative payment arrangement in time for the next payment.

⁴ For example, stamps and checks can be costly for low-income consumers and are not always readily available without a trip to the post office or bank.

When borrowers fail to respond to a request for reauthorization, their accounts are routinely placed in collections.

As a result, even where a borrower wanted to make the next payment through her prior authorization, the Small Dollar Rule would override the borrower's choice of payment, and result in the borrower defaulting or becoming delinquent on the loan, accruing additional interest and penalties, and/or having negative information reported to a registered information system or credit reporting agency. Furthermore, the borrower may not be able to access additional credit when her prior loan is in collections. Each of these hardships could be avoided or deferred if the Small Dollar Rule did not revoke the borrower's payment authorization. In this way, the Rule would exacerbate harms that it was intended to mitigate.

II. The Rule's Reauthorization Requirement Will Decrease the Availability of Credit

Payment authorizations generally enhance creditworthiness, which allows lenders to loan to populations that may not otherwise qualify for loans. Absent such payment authorizations, consumers who pose a high credit risk might not otherwise have any access to credit, or would only have access to credit from more costly sources. Cutting off lenders' ability to attempt a third payment (which is more restrictive than current NACHA rules) will increase credit risk, making lenders less willing to lend to consumers with poor credit histories without increasing interest rates and fees.

The Small Dollar Rule will also increase lending costs. Many lenders that are small businesses do not currently have the capability to track failed withdrawal attempts from borrower accounts. These lenders will have to develop, monitor, and maintain such systems in order to comply with the Rule's payments provisions. Lenders will be forced to pass along to borrowers the added costs associated with such systems, which will further increase the cost of credit for consumers.

III. Payment Reauthorization Notices Will Overwhelm Consumers and Create Opportunities for Bad Actors to Defraud Consumers

The Small Dollar Rule, other federal laws, and state laws collectively require lenders to send a large and growing number of notices and disclosures in connection with small dollar loans. The sheer number of notices and disclosures can overwhelm consumers and make it less likely that consumers read any individual notice, including a request to reauthorize payments from their account. As a result, consumers may bear the harmful consequences of their loans going into collections more often than the CFPB assumes.

Additionally, the number of notices and disclosures that lenders are required to send under the Small Dollar Rule creates opportunities for sophisticated fraudsters to try to confuse borrowers by sending unsolicited payment authorization requests. Borrowers will also become more vulnerable to scam emails that ask for their account information for the ostensible purpose of reauthorizing payments on a small dollar loan. Because it will become more commonplace for legitimate lenders to send payment reauthorization requests, borrowers will have less reason to question the veracity of these types of messages, and may mistakenly provide account information to imposters, leading to their bank accounts being drained.

IV. Some State Laws Prohibit Sending the Payment-Related Notices Required Under the Rule, Leaving Lenders in Violation of Federal or State Law

Some states limit the circumstances in which lenders may communicate with borrowers about payments. For instance, without express written authorization, a lender is prohibited from communicating with a borrower in Oklahoma before the payment due date to remind the borrower of the upcoming due date.⁵ In the state of Washington, a communication by a lender is presumed to be made for the purposes of harassment if it is initiated by the licensee for the purposes of collection and it is made with a borrower or spouse in any form, manner, or place, more than three times in a week.⁶ The payment reminder notices and/or payment reauthorization requests required by the Small Dollar Rule create conflicts with these types of state laws. In the case of a payment reminder notice, such a conflict would require the lender to violate either federal law or state law. In the case of a payment reauthorization request, the lender could be forced under state law to forego making the request and instead proceed to collections, which would impose hardships on the borrower.

V. The Rule's Payments Provisions Sweep Too Broadly and are Outdated as Improvements to NACHA Rules have Solved Potential Excessive Overdrafts.

The Small Dollar Rule's prohibition on a lender from making a third attempt at withdrawing payment after two failed attempts applies equally to all methods of electronic payment, including through automated clearing house (ACH), remotely created checks (RCC), signature checks, and debit cards.⁷ However, debit cards operate differently than other methods. When a lender attempts to withdraw a payment using a debit card and the borrower's deposit account lacks the funds for the payment, the bank will deny the payment without imposing an insufficient funds ("NSF") fee on the borrower.

Given that reducing the number of NSFs caused by small dollar loans was the CFPB's sole articulated reason for imposing the Rule's payment provisions, there is no justification for including debit card payments within the scope of these provisions. The Rule's prohibition on withdrawal attempts by means of debit card payments after two failed attempts imposes the hardships described throughout this letter without providing any benefit to consumers.

Likewise, as we have discussed previously,⁸ NACHA return thresholds implemented in September 2015 address the harms that the Small Dollar Rule is intended to address, but in a more effective manner than the Rule. These return thresholds that give lenders every incentive not to initiate repeated debits that would harm borrowers, thereby rendering the Rule unnecessary. Despite the stringency of the NACHA thresholds, lenders could be in compliance

⁵ Okla. Admin. Code § 160:70-11-3.

⁶ RCWA § 31.45.082(3)(a).

⁷ See 12 C.F.R. § 1041.8(a)(1)(i).

⁸ See our October 2016 comment letter, n. 2 above, at p. 54. For a merchant to remain a participant in the ACH payments system, the NACHA rules limit the merchant's total returns to 15 percent, administrative returns to 3 percent, and returns for unauthorized transactions to 0.5 percent.

with them but prohibited by the Rule from initiating a payment withdrawal attempt, with the result that the Rule would impose hardships that outweigh any benefits to consumers.

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We are eager to work with the Bureau to find better, more practical solutions than the Small Dollar Rule's payment provisions that do not impose the same operational hardships on consumers. For instance, instead of the Rule's unprecedented requirement for lenders to unilaterally revoke consumers' valid payment authorizations, the CFPB could require payment notices to contain a reminder that consumers have the right to revoke their authorizations under Regulation E. The CFPB could even require the payment notice to include a hyperlink for borrowers to use to revoke payment authorization. Such a disclosure would allow consumers, not lenders, to control the exercise of their rights.

We appreciate your consideration of our concerns. If you have questions, need additional information, or would like to meet to discuss these matters, please feel free to contact me at mjackson@oladc.org.

Respectfully submitted,



Mary Jackson
President and CEO