

NACCA

National Association of Consumer Credit Administrators

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October 6, 2016

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Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

Re: Proposed Rulemaking: Payday, Vehicle Title, and Certain High-Cost Installment Loans
Dkt. No. CFPB-2016-0025
RIN 3170-AA40

Dear Ms. Jackson:

With the release by the Consumer Financial Protection Bureau (CFPB) of its Notice of Proposed Rulemaking on Payday, Vehicle Title, and Certain High-Cost Installment Loans¹, the National Association of Consumer Credit Administrators (“NACCA”)² is pleased to provide the following comments.

NACCA recognizes and appreciates the CFPB’s efforts in collecting extensive information and data to compile the detailed commentary accompanying the sixty-seven page proposed rule. NACCA seeks to foster the safe and sound growth of the small dollar lending industry in a manner conducive to innovation while protecting consumers from practices harmful to their financial well-being.

NACCA Comments

1. Potential Conflict Between Federal and State Law

NACCA’s concerns focus significantly on whether the proposal creates a workable environment for cooperative state and federal regulation of the small dollar lending industry.

¹ 81 *Federal Register* 47863, 356 pages (July 22, 2016).

² Formed in 1935, the National Association of Consumer Credit Administrators (NACCA) seeks to improve supervision of consumer credit companies and to facilitate administration of laws governing these companies. NACCA membership includes agencies from all 50 states, the District of Columbia, Puerto Rico, and Alberta, Canada which license and regulate non-depository institutions such as finance companies, mortgage companies, small loan companies, payday lenders, pawnbrokers, and other similar types of industries.

The CFPB grounds its authority to issue the proposed rule under the Dodd-Frank Act (“Dodd-Frank”) and walks through a syllogism of its legal authority in the commentary to the rule.^{3 4} NACCA raises the concern that potential conflicts between states with more restrictive laws than those established by the proposed rule will not be resolved by reliance on the language of section 1041.

While the CFPB’s emphasis is that the rule establishes a floor rather than a ceiling for the proposed regulation, the current underlying statutory basis for the proposed regulation does little to alleviate the concerns.⁵ In addition, neither the proposed rule nor the underlying authority relied upon to promulgate the rule clarify the lines through which a determination of what is more or less restrictive can be made.

A couple of examples may aid in illustrating this potential insufficiency:

- a. Currently, thirty-six states have some form of fee or interest rate caps (usury rate limits) while the balance of fourteen states and the District of Columbia have no statutory rate caps. The proposed rule would have the effect of establishing a threshold for the existence of small-dollar consumer loan products, but presumably would not alter, annul, or amend existing state imposed rate restrictions. Some NACCA member states have expressed concerns related to inevitable conflicts between state and federal requirements, and that the proposed rule will have an ultimate preemptive effect on states’ consumer lending regulatory oversight established by the various state legislatures over many decades.
- b. In the context of the definition of “covered short-term loan,” “covered longer-term loan,” or “covered loans,” the concern arises as to which rules will provide for the determination of whether a loan is a covered loan for the purposes of applying the restrictions advanced in the proposed rule.⁶ Will the reliance be in deference to an application of the Unfair or Deceptive Acts or Practices (UDAP)⁷ or Unfair, Deceptive or Abusive Acts or Practices (UDAAP)⁸ via the proposed rule?⁹

Additionally, the proposed rule offers an alternative method to make a covered short-term loan that would require no ability to repay determination. (See § 1041.7 at p. 385 and 1143.) Some NACCA member states feel that this alternative method will create a conflict with state laws that prohibit short-term consumer loans, including rollovers.

³ Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 U.S.C. §§ 5301 et seq. (2010).

⁴ See CFPB, Commentary, *Payday, Vehicle Title, and Certain High Cost Installment Loans*, proposed rule 12 CFR Part 1041 (Dkt. No. CFPB-2016-0025, RIN 3170-AA40) at 1, 129-142. (Hereinafter, cited as Commentary at)

⁵ See Commentary at 140-142.

⁶ See Commentary at 147-149, and See *Payday, Vehicle Title, and Certain High Cost Installment Loans*, proposed rule 12 CFR Part 1041.11(b)(5) and (6) (Dkt. No. CFPB-2016-0025, RIN 3170-AA40) at 1157-1159.

⁷ 12 C.F.R. Part 227

⁸ Dodd-Frank Act, Title X, Subtitle C, Sec. 1036; PL 111-203 (July 21, 2010).

⁹ See *Payday, Vehicle Title, and Certain High Cost Installment Loans*, proposed rule 12 CFR Part 1041.11(b)(5) and (6) (Dkt. No. CFPB-2016-0025, RIN 3170-AA40) at 1157-1159.

2. Significance of Regulatory Burden Imposed Upon States

The CFPB's proposed rule risks the imposition of a significant regulatory burden upon the states to regulate and enforce its mandates. Some NACCA member states question whether the resources exist and/or where the additional resources may come from to take on the additional burden in terms of examination and enforcement of the proposed rule.

3. Ability to Repay Provisions

The proposed rule's language is vague regarding the three criteria for a lender's assessment of a borrower's ability to repay (ATR).¹⁰ (See p. 1137.) The conditions proposed by the rule create a complex and somewhat ambiguous model and appear to defer to the lender for determination. In addition, the ATR criteria fails to take into consideration the overall inability of consumers to understand the material risks and costs of the loan products.

- a. Condition one: "the consumer's residual income will be sufficient for the consumer to make all payments under the loan and to meet basic living expenses during the shorter of the term of the loan or the period ending 45 days after consummation of the loan."
- b. Condition two: "the consumer will be able to make payments required for major financial obligations as they fall due, to make any remaining payments under the loan, and to meet basic living expenses for 30 days after having made the highest payment under the loan on its due date."
- c. Condition three: "[f]or a loan for which the presumption of unaffordability applies under §1041.6, the applicable requirements of §1041.6 are satisfied."¹¹

Aside from the vagueness, none of the conditions appear to contemplate the use of underwriting standards used typically in connection with loan products already available on the market, and certainly create an environment in which the lender exercises and administers the determination for the consumer's ability to repay.

4. Access to Registered Information Systems

The CFPB rule proposes the creation of a comprehensive information system or systems into which lenders will furnish the consumer's current and recent borrowing history involving most covered loans.¹² Several states including Alabama, Delaware, Florida, Illinois, Indiana, Kentucky, Michigan, New Mexico, North Dakota, Oklahoma, South Carolina, Virginia,

¹⁰ See *Payday, Vehicle Title, and Certain High Cost Installment Loans*, proposed rule 12 CFR Part 1041.11(b)(5) and (6) (Dkt. No. CFPB-2016-0025, RIN 3170-AA40) at 1137. Commentary beginning at 249.

¹¹ See *Payday, Vehicle Title, and Certain High Cost Installment Loans*, proposed rule 12 CFR Part 1041.11(b)(5) and (6) (Dkt. No. CFPB-2016-0025, RIN 3170-AA40) at 1135 to 1137. Commentary beginning at 249.

¹² See *Payday, Vehicle Title, and Certain High Cost Installment Loans*, proposed rule 12 CFR Part 1041.16-1041.17 (6) (Dkt. No. CFPB-2016-0025, RIN 3170-AA40) at 1178 to 1187. Commentary beginning at 836.

Washington, and Wisconsin have databases required by state law or regulation.¹³ There is concern by some of these states about the impact the information systems required by the proposed rule will have on their state required database (i.e. concerns regarding eligibility queries, compatibility of the systems). Some NACCA member states raise concerns as to accessibility of the information system(s) required by the proposed rule and the costs associated with its maintenance. In addition, the rule does not address mechanisms to independently verify the data in the information system(s) and to secure its confidentiality. Thus, NACCA believes additional details are needed regarding the information systems required by the proposed rule.

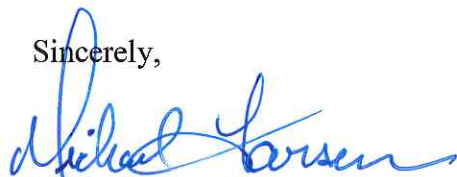
5. Credit Availability

States operate under a dual mandate to achieve the goals of consumer protection and ensuring credit availability. Some NACCA member states have expressed a concern that the proposed rule may create an environment in which the proposed consumer protection requirements may greatly restrict the availability of credit placing state regulators in a position to lose the balance between the two goals set by their respective state legislatures, i.e. consumer protection and reasonable credit availability. Some NACCA member states have oversight responsibilities for both depository and non-depository financial institutions. Some of those members have expressed concerns that the CFPB's proposed rule will discourage community banks and other depository lenders from developing small dollar lending programs and also make it less likely that banks will continue to provide small dollar loans as an accommodation to existing customers. NACCA is concerned that in an environment of restricted credit availability, market demand for short-term consumer credit may be met by increased unlawful offshore lending from individuals and entities difficult to identify or regulate.

Conclusion

NACCA reiterates its interest in fostering measured growth of the small dollar lending industry in a manner conducive to innovation while protecting borrowers from practices harmful to their financial well-being. This desired outcome, of course, requires a rule promulgated with consideration of decades of state regulatory oversight based on legislative efforts to balance consumer protections and credit availability. NACCA expresses appreciation for the opportunity to comment on the CFPB proposed rule.

Sincerely,



Michael Larsen
President
National Association of Consumer Credit Administrators

¹³ See Commentary at 31, fnt. 67.