March 20, 2019

ATTORNEY GENERAL RAOUL OPPOSES CFPB EFFORT TO DELAY PROTECTIONS FROM PAYDAY LENDERS

Chicago — Attorney General Kwame Raoul, as part of a coalition of 25 attorneys general, today urged the CFPB to take immediate action to protect consumers from abuses in payday lending, vehicle title lending, and other types of high-cost exploitative consumer lending.

In comments submitted Monday, Raoul and the attorneys general argue that the CFPB's proposed rule would arbitrarily delay implementation of regulations that would require high-cost loan lenders to assess borrowers' ability to repay. The proposed rule would delay commonsense protections the CFPB announced after a comprehensive five-year review process and were scheduled to be enacted last year.

"The payday loan industry has notoriously targeted low-income residents in need of cash quickly for high-cost loans that are extremely difficult to repay," Raoul said. "The CFPB must not delay these commonsense regulations to ensure that loans are based on borrowers' ability to pay while prohibiting lenders from engaging in abusive repayment practices."

In 2017, the CFPB announced a new rule that would help protect borrowers and ensure they would have the ability to repay loans, while also prohibiting lenders from using abusive tactics when seeking repayment. The rule went into effect in early 2018, but compliance was delayed to Aug. 19, 2019, to give lenders time to develop systems and policies. The CFPB has now proposed to further delay compliance to Nov. 19, 2020, more than three years after the regulation was finalized. At the same time, the CFPB is reviewing another rule that would altogether rescind the regulations.

Together, these actions would jeopardize hard-fought borrower protections. In the comments, Raoul and the attorneys general cite the CFPB's own findings that demonstrate the many ways the short-term payday and title lending model is broken, specifically as a significant percentage of these loans are expected to fail. In fact, 90 percent of all loan fees come from consumers who borrow seven or more times in 12 months. Twenty percent of payday loan sequences end in default, and 33 percent of single-payment auto title loan sequences end in default.

Joining Raoul in submitting the comments are the attorneys general of California, Colorado, Connecticut, the District of Columbia, Delaware, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Nevada, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin.

JOSH STEIN
ATTORNEY GENERAL

March 18, 2019

Via Electronic Submission

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

Re: Docket No. CFPB-2019-0007 / RIN 3170-AA95
Payday, Vehicle Title, and Certain High-Cost Installment Loans;
Delay of Compliance Date

Dear Director Kraninger:

On behalf of the 25 undersigned State Attorneys General, we hereby submit comments to the Consumer Financial Protection Bureau's ("CFPB") above-referenced notice of proposed rulemaking. For the reasons set forth in greater detail below, we have serious concerns about the proposal and urge CFPB not to adopt the proposed rule.

On October 5, 2017, CFPB reached the end of a comprehensive five-year process and finalized a groundbreaking regulation to protect consumers from abuses in payday lending, vehicle title lending, and other types of high-cost exploitative consumer lending. *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 82 Fed. Reg. 54,472 (Nov. 17, 2017) ("2017 Rule"). The 2017 Rule imposes a number of common sense underwriting requirements on lenders that make such loans to ensure that borrowers have an ability to repay their loans ("Underwriting Protections"),[1] as well as prohibiting abusive repeated withdrawals in seeking repayment and requiring disclosures related to payment transfer attempts ("Payment Provisions").[2] In finalizing the 2017 Rule, which gave more leeway to high-cost lenders than some Attorneys General believed was warranted, CFPB provided over 1,500 pages of meticulously documented support for it. The 2017 Rule became effective on January 16, 2018, although most provisions have a compliance date of August 19, 2019 because CFPB concluded that affected lenders would need time to develop the necessary systems and policies.

Notwithstanding CFPB's decision to give affected lenders nearly two years to comply with the 2017 Rule, CFPB is now proposing further delaying the compliance date for the

[1] 12 C.F.R. §§ 1041.4 - .6, .10 - .11, .12(b)(1) - (3).
[2] 12 C.F.R. §§ 1041.7 - .9, .12(b)(4) - (5).

Underwriting Protections until November 19, 2020—more than three years after the regulation was finalized—while it considers a separate proposed regulation[3] that would altogether rescind them. *Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date*, 84 Fed. Reg. 4298 (proposed Feb. 14, 2019) ("Proposed Delay Rule"). These proposals were issued only after representatives of the payday industry secretly lobbied CFPB's former Acting Director Mick Mulvaney, and after CFPB falsely denied that such a meeting had occurred. *See* Kevin Dugan, *Lend Me Your Ear: CFPB Quietly Met with Payday Firms*, N.Y. Post, Feb. 28, 2019, at 30. CFPB, however, provides legally inadequate justification for departing from its prior decision that the August 2019 compliance deadline provided ample time for affected lenders to comply with the 2017 Rule.

This matter is of particular concern to the Attorneys General because we share authority with CFPB to enforce the 2017 Rule.[4] The delay in the Underwriting Protections will leave the citizens of our states unprotected from many types of exploitative loans, and could embolden lenders who would seek to circumvent the laws of those states with strong protections against such loans. The undersigned State Attorneys General vigorously oppose CFPB's proposal to delay the compliance date—as well as its proposal to altogether rescind the Underwriting Protections, which will be addressed in a forthcoming comment—and we will not hesitate to consider taking legal action if CFPB unlawfully proceeds.

I. The Compliance Date for the Underwriting Protections Should Remain Unchanged Because CFPB Correctly Determined in the 2017 Rule that they Provide Legally Appropriate and Necessary Consumer Protections that Should be Implemented Without Further Delay

As CFPB implicitly acknowledges by submitting the Proposed Delay Rule for formal notice and comment, the Administrative Procedure Act ("APA") requires an agency to comply with its provisions for new rulemaking when the agency seeks to delay the scheduled implementation date of a previously promulgated regulation. *See, e.g.*, *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 111-12 (2d Cir. 2018); *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (per curiam); *N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 765-66 (4th Cir. 2012). The APA prevents an agency from acting in an "arbitrary" or "capricious" manner in promulgating a new regulation. 5 U.S.C. § 706(2)(A). Although the APA allows an agency to change course, it may not "simply disregard rules that are still on the books" and "must show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Moreover, an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when the "new policy rests upon factual findings that contradict those which underlay its prior policy." *Id*.

Although the Proposed Delay Rule has been proposed simultaneously with the Proposed Rescission Rule, they will not take effect at the same time. *See* Proposed Delay Rule, 84 Fed.

---

[3] *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 84 Fed. Reg. 4252 (proposed Feb. 14, 2019) ("Proposed Rescission Rule").
[4] *See* 12 U.S.C. § 5552.

Reg. at 4299 (acknowledging that the Proposed Rescission Rule cannot reach "an orderly conclusion" prior to the Proposed Delay Rule's effective date). CFPB "cannot use the purported proposed future revision, which has yet to be passed, as a justification for" the delay. *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1064 (N.D. Cal. 2018). Instead, the Proposed Delay Rule must be justified on its own merits. *Id*. Indeed, the D.C. Circuit has squarely rejected the arguments that the temporary suspension of a regulation "is subject to a less stringent standard of review" under the APA or that "a less complete discussion and consideration of alternative courses of agency action, a lesser degree of factual certainty, and a less precise explanation of the bases for the decision are needed" to temporarily suspend a regulation. *Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984).

The Proposed Delay Rule fails to satisfy these APA requirements. The 2017 Rule was a legally appropriate exercise of CFPB's statutory mandate to protect the consumers of our states, and the rest of the nation, from abusive consumer finance products. This includes the 2017 Rule's analysis for when affected lenders should have to start complying with the Underwriting Protections. The reasons cited in the Proposed Delay Rule for contradicting CFPB's prior analysis of the unfair and abusive nature of payday loans made without consideration of borrowers' ability to repay or other common sense underwriting, and for contradicting its prior analysis for setting the compliance deadline, are woefully insufficient and therefore arbitrary and capricious in violation of the APA. *See Fox Television Stations*, 556 U.S. at 515; *Pub. Citizen*, 733 F.2d at 98, *Bureau of Land Mgmt.*, 286 F. Supp. 3d at 1064.

A. The 2017 Rule Correctly Identified Unfair and Abusive Underwriting Practices in High-Cost Lending

The 2017 Rule was the culmination of five years of extensive research and study by CFPB into payday, vehicle title, and high-cost installment loans. CFPB's research and study showed clear evidence of substantial harm to financially vulnerable consumers caused by making these loans without regard to consumers' ability to repay. Delay of the 2017 Rule allows the perpetuation of these grave harms to consumers and, therefore, should not be permitted.

Indeed, CFPB's extensive rulemaking record, which includes five reports published by CFPB, compellingly demonstrates the serious harm caused to consumers by issuing these loans without regard to consumers' ability to repay. 2017 Rule, 82 Fed. Reg. at 54,507-08. CFPB's own findings—which are undisputed—include the following:

- <u>Borrowers are lower-income and in financial difficulty</u>. Consumers who use short-term payday and vehicle title loans tend to come from lower- or moderate-income households, and are in financial difficulty. *Id.* at 54,554. They generally do not have any savings to fall back on, and a sizable percentage report that they would have taken a loan "on almost any terms offered." *Id.*

- <u>The lending model is dependent on re-borrowing</u>. "[T]he payday lending business model is *dependent* upon a large volume of re-borrowing—that is, rollovers, back-to-back loans, and re-borrowing within a short period of paying off a previous loan—by those borrowers who do not default on their first loan." *Id.* at 54,484 (emphasis added). Over 80 percent of the loans are rolled over or followed by another loan within 14 days. *Id.* at 54,508. Further, 90 percent of all loan fees comes from consumers who borrow 7 or more times in 12 months, and 75 percent comes from consumers who borrow 10 or more times in 12 months. An industry trade association has openly acknowledged that "[i]n any large, mature payday loan portfolio, *loans to repeat borrowers generally constitute between 70 and 90 percent of the portfolio, and for some lenders, even more*." *Id.* at 54,484 (emphasis added). The result is that borrowers end up paying far more in fees than the amount they received in credit.

- <u>Loans have high rates of default and are subject to aggressive debt collection efforts</u>. Twenty percent of payday loan sequences end in default, and 33 percent of single-payment auto title loan sequences end in default. *Id.* at 54,555. Consumers who default can become subject to often aggressive and psychologically harmful debt collection efforts. *Id.* Indeed, "where lenders' attempts to extract money directly from the consumer's account fail, the lender often will resort to other collection techniques, some of which—such as repeated phone calls, in-person visits to homes and worksites, and lawsuits leading to wage garnishments—can inflict significant financial and psychological damage on consumers." *Id.* at 54,589.

- <u>Auto seizure and loss of transportation</u>. Thirty-five percent of vehicle title borrowers pledge the title to the *only* working vehicle in the household. *Id.* at 54,574. Almost one in five auto title loan sequences ends with the consumer's vehicle being repossessed. *Id.* at 54,589. "Consumers whose vehicles are repossessed and who do not have another vehicle may end up either wholly dependent on public transportation or family or friends to get to work, to shop, or to attend to personal needs. In many personal situations and parts of the country, such as rural areas and urban areas without public transportation that is reasonably available, this means they may end up without any effective means of transportation at all." *Id.*

- <u>Steep penalty fees</u>. Attempts by lenders to debit payments from a consumer's checking account can add a steep, hidden cost to payday loans.[5] CFPB research found that, over a period of 18 months, half of payday and payday-installment online borrowers have at least one debit attempt that overdrafts or fails. These

[5] Press Release, CFPB, CFPB Finalizes Rule to Stop Payday Debt Traps (Oct. 5, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-stop-payday-debt-traps/.

borrowers incur an average of $185 in bank penalty fees, in addition to any fees the lender might charge for failed debit attempts, specifically, a late fee, a returned payment fee, or both.[6]

- Account closure and loss of access to banking system. Where a consumer's bank account has a negative balance for an extended period of time, the bank may close the account. CFPB research found that 36 percent of accounts with a failed debit attempt from an online payday lender ended up being closed by the depository institution. This happened usually within 90 days of the first insufficient funds transaction.[7] When this occurs, consumers "will have to bear the many attendant costs of becoming stranded outside the banking system, which include greater inconvenience, higher costs, reduced safety of their funds, and the loss of the other advantages of a standard banking relationship." 2017 Rule, 82 Fed. Reg. at 54,564.

- Other collateral consequences. "[T]he Bureau believes many consumers, regardless of whether they ultimately manage to pay off the loan, suffer collateral consequences as they struggle to make payments that are beyond their ability to repay. For instance, they may be unable to meet their other major financial obligations or may be forced to forgo basic living expenses as a result of prioritizing a loan payment and other loan charges—or having it prioritized for them, in ways they cannot control, by the lender's exercise of its leveraged payment mechanism." *Id.* at 54,589-90; *see also id*. at 54,575-76.

As CFPB's findings make painfully clear, the short-term payday and title lending model is fundamentally broken, as a significant percentage of these loans are expected—if not designed—to fail. Indeed, the model is profitable *only* because of the extreme financial distress experienced by many of these borrowers; and the model takes undue advantage of these vulnerable borrowers:

> Lending to borrowers who cannot repay their loans would generally not be profitable in a traditional lending market, but … the factors that funnel consumers into cycles of repeat re-borrowing turn the traditional model on its head by creating incentives for lenders to actually want to make loans to borrowers who cannot afford to repay them when due if instead the consequence is that these borrowers are likely to find themselves re-borrowing repeatedly.

Id. at 54,562.

---

[6] *Id.*
[7] *Id.*

The 2017 Rule's Underwriting Protections implemented a reasonable, common sense principle that the loans should be made with due regard for an individual borrower's ability to repay. That common sense principle remains unchanged; and the grave harm to consumers resulting from loans that would violate the 2017 Rule remains unchanged. Accordingly, there is no reasonable basis for delay.

B. The Proposed Delay Rule Arbitrarily and Capriciously Contradicts the Implementation Period Analysis in the 2017 Rule

In proposing the 2017 Rule, CFPB originally set a compliance date of 15 months after the rule was published (which would have been February 17, 2019). *See* 2017 Rule, 82 Fed. Reg. at 54,813. In light of comments received during that rulemaking, the compliance date was extended by an additional 6 months to provide lenders with a total of 21 months to prepare for its implementation. *See id*. at 54,813-14. CFPB provided the following explanation for setting the 21-month deadline:

> The Bureau seeks to balance giving enough time for an orderly implementation period against the interest of enacting protections for consumers as soon as possible. The Bureau believes that by providing an additional 6 months for compliance with §§ 1041.2 through 1041.10, 1041.12, and 1041.13, lenders should be able to reasonably adjust their practices to come into compliance with the rule.

Id. at 54,814. Similarly, in explaining why it would not delay finalizing portions of the 2017 Rule to allow for experimentation on possible other ways to evaluate a borrower's ability to repay, CFPB explained its conclusion that "testing ideas in the market would not prove a fruitful value proposition in view of the further delays in finalizing the rule" because of "the particular history of this rulemaking—which has involved to date many years of study, outreach and deliberation, and where the compliance date of §§ 1041.2 through 1041.10, 1041.12, and 1041.13 will not be for another 21 months." *Id*. at 54,662.

CFPB has now abruptly changed course. In the Proposed Delay Rule, CFPB blithely states that "the Bureau preliminarily concludes that it should not assign the weight that it did in the 2017 Final Rule to 'the interest of enacting protections for consumers as soon as possible.'"[8] 84 Fed. Reg. at 4302. This statement is disturbing both in its brevity and its content. As to the former, CFPB provides absolutely no reasoning why it is no longer assigning such weight to the

[8] In rejecting comments requesting more than 19 months to comply, the 2017 Rule stated that "the Bureau will monitor the implementation period and make adjustments as appropriate." 82 Fed. Reg. at 54,814. But the statement in the Proposed Delay Rule about eliminating the weight assigned to protections for consumers conclusively indicates that the proposed delay is not an exercise of CFPB's anticipated monitoring but a complete about-face. Moreover, for the reasons explained below in Section II, the Proposed Delay Rule is not based on any legitimate or documented results from such monitoring.

protection of consumers, and leaves open the possibility that the change may have been driven by undisclosed lobbying or other procedurally improper considerations. As to the latter, diminishing the weight assigned to protecting consumers contradicts the statutorily mandated objectives of CFPB. Specifically, CFPB is charged by statute with "ensuring that, with respect to consumer financial products and services . . . consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination." 12 U.S.C. § 5511(b)(2). Absent from its statutory authorization is the goal of protecting the profits enjoyed by lenders engaged in unfair or abusive acts. Accordingly, it is galling that CFPB is justifying its change of course by announcing an intent to abandon its mandated mission to protect consumers and instead is protecting abusive lenders. It is also the antithesis of reasoned decision making but instead is arbitrary and capricious action. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (holding that an agency does not comply with 5 U.S.C. § 706(2)(A) when it, among other things, "relie[s] on factors which Congress had not intended it to consider"); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (holding that an agency's compliance with 5 U.S.C. § 706(2)(A) is based on "whether the decision was based on a consideration of the relevant factors").

II. No "Unanticipated Potential Obstacles to Compliance" Warrant a Delay in the Compliance Date for the Underwriting Protections

In support of the Proposed Delay Rule, CFPB contends that its "outreach to affected entities has brought to light potential obstacles to compliance that were not anticipated when the original compliance date was set." 84 Fed. Reg. at 4299. To the contrary, CFPB's professed rationales for delay are specious and do not suffice to support postponing the compliance deadline for the Underwriting Protections.

At the outset, the undersigned Attorneys General note that CFPB has opined that the supposed obstacles to compliance are, in its own words, *potential*—and not even probable, much less, certain. A nebulous "potential" obstacle to compliance is not a reasonable basis for delaying a validly promulgated, sound rule that was five years in the making. Furthermore, these ostensible "obstacles" are baseless for the reasons stated below.

A. Changes to Three States' Laws Do Not Support Delay of the Underwriting Protections

As one example of an "obstacle," CFPB proffers that "several States have recently enacted laws applicable to loans subject to the 2017 Final Rule's Mandatory Underwriting Provisions." *Id.* at 4300. CFPB represents that "some industry participants" have told CFPB that they are prioritizing developing compliance management systems in response to these state laws and do not have sufficient resources to conform their compliance management systems to address both newly enacted state laws and the 2017 Rule at the same time. *Id.* In support, CFPB cites changes made in 2018 to lending laws in Ohio, Colorado, and Florida. *Id.* at n.17.

It is axiomatic that, in a federalist polity composed of a dual system of federal and state regulation, there will be periodic changes in state laws, and lending laws are no exception. To now delay a *federal* rule based upon changes last year to individual *state* laws in Ohio, Colorado, and Florida is preposterous. If CFPB is now seriously entertaining the practice of delaying the implementation of a federal rule premised on recently-enacted state laws, then much of CFPB rulemaking—indeed all federal rulemaking—may as well grind to a halt, as state laws and regulations are continuously being enacted and therefore could prevent any federal rule from ever taking effect.

Further, anecdotal or hearsay evidence of industry's purported inability to comply with both federal and state laws does not, without more, stand up to scrutiny. For example, with regard to Colorado, as CFPB notes, in 2018 Colorado voters approved a ballot initiative to cap annual percentage rates on payday loans at 36 percent. *Id.* However, as also noted by CFPB in its 2017 Rule, the federal Military Lending Act ("MLA"), enacted in 2006, provides that a creditor may not impose a military annual percentage rate greater than 36 percent on active military service members; and the Department of Defense promulgated rules under the MLA in 2007 and 2015. *See* 82 Fed. Reg. at 54,484-85. As home to no less than three federal military bases—Fort Carson, Peterson Air Force Base, and Cheyenne Mountain Air Force Base—lenders in Colorado have adhered to a 36 percent interest rate cap for service members for years. Accordingly, claims that lenders cannot readily comply with those caps with regard to the remainder of Colorado's population, as well as implement CFPB's Underwriting Protections, strains credulity.

Finally, the 2017 Rule demonstrates that, contrary to CFPB's current statements, changes to state laws were not "unanticipated," and in fact were taken into account, when the 2017 Rule's implementation date was made final. As part of the rulemaking that led to the 2017 Rule, the Small Business Administration's Office of Advocacy ("SBA") "encouraged the Bureau to allow at least 24 months for small entities to comply with the rule, in part because small entities have undergone *a number of other regulatory changes, including due to the implementation of State lending laws* and the Military Lending Act." *Id*. at 54,859 (emphasis added). CFPB responded to these concerns by noting that it "appreciates the concern" and "has increased the compliance date" from the originally proposed timeframe. *Id*. CFPB went on to specify that "[t]he Bureau believes this is a sufficient period for compliance with the final rule" notwithstanding the SBA's concerns about the changing nature of state lending laws. *Id*. In light of CFPB receiving, considering, and explicitly responding to those concerns from SBA about the changing nature of state laws, it cannot be said that continued changes in state laws since November 2017 were "unanticipated." Accordingly, the Proposed Delay Rule cannot be justified as a response to unanticipated state law developments. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 658 (holding that an agency does not comply with 5 U.S.C. § 706(2)(A) when it, among other things, "offer[s] an explanation for its decision that runs counter to the evidence before the agency").

B. Purported Delays to Systems Upgrades by Software Vendors are Unsubstantiated, if Genuine, and Were Likely Facilitated by CFPB's Signaling Its Intended Rescission of the 2017 Rule

The second "obstacle" proffered by CFPB as a ground for delay is CFPB's contention that some lenders have complained that third-party vendors have not committed to developing needed software, which will ostensibly prevent them from coming into compliance with the Underwriting Protections by August 19, 2019. Proposed Delay Rule, 84 Fed. Reg. at 4300. CFPB's description of these software and vendor implementation impediments is vague, anecdotal, and unsubstantiated; and, therefore, this "obstacle" is not a valid basis for delay. *See Assoc. of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.) (agency action is "arbitrary or capricious" when it "is devoid of needed factual support").

As set forth above, the industry has had 21 months to prepare for compliance with the 2017 Rule, and it has been almost three years since CFPB issued its Proposed Payday Rule, which clearly indicated the type of changes that were likely forthcoming. In light of this long period of time to achieve compliance, CFPB should be skeptical of industry claims that they are unable to timely comply. Finally, CFPB should consider whether this alleged problem is one of CFPB's own making. Indeed, by issuing a statement on January 16, 2018—a bare two months after issuing the 2017 Rule—that CFPB intended to engage in rulemaking to reconsider the 2017 Rule, CFPB signaled that the 2017 Rule was likely to be revised, and therefore that lenders need not take timely steps to comply.[9] CFPB would be acting in an arbitrary and capricious manner to rely on a self-created "obstacle" as a justification for a delay in the Underwriting Protections' compliance date. *Cf. Nat. Res. Def. Council*, 894 F.3d at 114-15 (rejecting an agency's use of the APA's "good cause exception" to notice and comment because "[g]ood cause cannot arise as a result of the agency's own delay").

III. CFPB's Cost-Benefit Analysis Unjustly Discounts the 2017 Rule's Findings with Respect to Consumer Benefits

Federal law requires CFPB to consider the costs and benefits of any final rule. 12 U.S.C. § 5512(b)(2). Pursuant to this provision, the 2017 Rule includes a detailed cost-benefit analysis of CFPB's underwriting requirements. The 2017 Rule's cost-benefit analysis found that it would impose significant costs on the short-term payday and title lending industry but that these costs were outweighed by the consumer benefits. In particular, CFPB found that the 2017 Rule would preserve access to short-term emergency credit, which is potentially welfare-enhancing, but eliminate extended loan sequences and reduce defaults and delinquencies. 82 Fed. Reg. at 54,818, 54,835-46. CFPB found that these benefits both reduced consumer harm and aligned the short-term lending market with consumer expectations.

---

[9] Press Release, CFPB, *CFPB Statement on Payday Rule* (Jan. 16, 2018), https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/.

The Proposed Delay Rule, which adopts the cost-benefit analysis of the Proposed Rescission Rule, preserves the 2017 Rule's finding with respect to industry cost but largely jettisons the 2017 Rule's findings with respect to consumer benefits. The Proposed Delay Rule treats access to extended and harmful loan sequences as a benefit of delay. *See* Proposed Rescission Rule, 84 Fed. Reg. at 4284. Moreover, the Proposed Delay Rule disputes the 2017 Rule's conclusions with respect to consumer expectations and replaces the 2017 Rule's analysis with a simple utilitarian framework that assumes access to extended loan sequences reflects consumer preferences and, thus, enhances consumer welfare (defined as consumer surplus). *Id*. at 4290. In each case, as we will address in more detail in our forthcoming comment on the Proposed Rescission Rule, the Proposed Delay Rule fails to provide a factual justification for ignoring the 2017 Rule's detailed cost-benefit analysis.

IV. The Compliance Date for the Payment Provisions Should Remain Unchanged

The Proposed Delay Rule states that "[a]t this time, the Bureau is not proposing to delay the compliance date for the other provisions of the 2017 Final Rule, including the Payment Provisions." 84 Fed. Reg. at 4301. More specifically, CFPB states that if it determines any amendments to the Payment Provisions are necessary "the Bureau will commence a separate rulemaking initiative." *Id*. Under the APA, these statements mean that any regulation emerging from this rulemaking cannot alter the Payment Provisions' compliance date or substance because agencies cannot "use the rulemaking process to pull a surprise switcheroo." *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). Instead, "an agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former." *Id*. Any provisions in the final rule about Payment Provisions certainly would not be a "logical outgrowth" of the assurance in the proposed rule that those issues would be left for another rulemaking.

Accordingly, we are confused by CFPB's request for comment on "whether delaying the August 19, 2019 compliance date for the [Underwriting Protections] would have any crossover effects on implementation of the Payment Provisions." Proposed Delay Rule, 84 Fed. Reg. at 4301. To avoid ambiguity in the record, although the issue would not be properly addressed in this rulemaking, the undersigned Attorneys General believe that the Payment Provisions found in the 2017 Rule should go into effect as scheduled on August 19, and we can see no reason that the Payment Provisions cannot be effective on their own even if CFPB makes the improper decision to delay the Underwriting Protections. We are also not aware of any circumstance when a high-cost lender is not acting in an unfair and abusive manner by making more than two consecutive failed efforts to withdraw payments from an account without first obtaining new consumer authorization to do so notwithstanding the efforts by industry to exempt payments withdrawn from debit cards or specific types of lenders or loan products. Finally, we note that lenders will have had 21 months to prepare for the Payment Provisions by the time they become effective, and they should be held responsible for failing to meet the deadline just as they hold consumers responsible for failing to repay loans on time.

V. Conclusion

Although the leadership of CFPB has changed since the 2017 Rule was finalized, the mere fact that CFPB is under new leadership is not sufficient to justify the Proposed Delay Rule. As Judge Wilkinson has explained of administrative action:

> Changes in course, however, cannot be solely a matter of political winds and currents. The Administrative Procedure Act requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process. Otherwise, government becomes a matter of the whim and caprice of the bureaucracy, and regulated entities will have no assurance that business planning predicated on today's rules will not be arbitrarily upset tomorrow. Thus, the APA contemplates what is essentially a hybrid of politics and law—change yes, but only with a measure of deliberation and, hopefully, some fair grounding in statutory text and evidence.

N.C. Growers' Ass'n, 702 F.3d at 772 (Wilkinson, J., concurring). CFPB's Proposed Delay Rule fails this test.

For all the reasons stated above, the undersigned Attorneys General submit that no delay is appropriate to any aspect of the 2017 Rule's compliance date and that CFPB should not proceed with the Proposed Delay Rule. If, to the contrary, CFPB finalizes the Proposed Delay Rule, we will closely examine whether to take action to address any unlawful action by CFPB.

Sincerely,

JOSHUA H. STEIN
North Carolina Attorney General

XAVIER BECERRA
California Attorney General

PHILIP J. WEISER
Colorado Attorney General

WILLIAM TONG
Connecticut Attorney General

KATHLEEN JENNINGS
Delaware Attorney General

KARL A. RACINE
District of Columbia Attorney General

CLARE E. CONNORS
Hawai'i Attorney General

KWAME RAOUL
Illinois Attorney General

TOM MILLER
Iowa Attorney General

AARON M. FREY
Maine Attorney General

BRIAN E. FROSH
Maryland Attorney General

MAURA T HEALEY
Massachusetts Attorney General

DANA NESSEL
Michigan Attorney General

KEITH ELLISON
Minnesota Attorney General

AARON D. FORD
Nevada Attorney General

HECTOR H. BALDERAS
New Mexico Attorney General

GURBIR S. GREWAL
New Jersey Attorney General

LETITIA JAMES
New York Attorney General

ELLEN F. ROSENBLUM
Oregon Attorney General

JOSH SHAPIRO
Pennsylvania Attorney General

PETER F. NERONHA
Rhode Island Attorney General

THOMAS J. DONOVAN, JR.
Vermont Attorney General

MARK R. HERRING
Virginia Attorney General

BOB FERGUSON
Washington Attorney General

JOSHUA L. KAUL
Wisconsin Attorney General