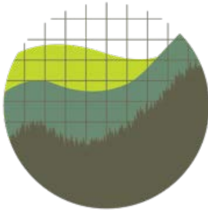

May 14, 2019

VIA ELECTRONIC SUBMISSION

Consumer Financial Protection Bureau

Re: Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. 4252 (proposed Feb. 14, 2019)

Docket ID: CFPB-2019-0006

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] respectfully submits the following comments to the Consumer Financial Protection Bureau ("CFPB" or the "Bureau") regarding its proposal ("Proposed Repeal") to rescind the 2017 Final Rule on Payday, Vehicle, Title and Certain High-Cost Installment Loans ("Payday Lending Rule" or the "2017 Final Rule").[2] Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

Our comments focus on CFPB's failure to provide a reasoned explanation for reversing key legal and economic conclusions of the Payday Lending Rule. Specifically, the Proposed Repeal impermissibly:

- Ignores costs that rescinding the Payday Lending Rule will impose on consumers while recognizing benefits that repeal will confer upon lenders;
- Fails to show that repeal of the Payday Lending Rule is economically justified;
- Fails to provide a reasoned explanation for disregarding the Payday Lending Rule's determination that certain practices were unfair and abusive, instead inventing and retroactively misapplying a heightened evidentiary standard without justification; and
- Mischaracterizes the findings underlying the Payday Lending Rule and past findings of the Federal Trade Commission in setting forth a new test for whether an injury is reasonably avoidable.

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[1] This document does not purport to present New York University School of Law's views, if any.

[2] Final Rule on Payday, Vehicle, Title and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017).

I. Background

Promulgated by CFPB pursuant to Section 1031 of the Dodd-Frank Act, the Payday Lending Rule applies to certain types of short-term or balloon-payment loans and requires lenders to determine, before making a covered loan, that the consumer has the ability to repay it.[3] In issuing the rule, the Bureau concluded that issuing covered loans *without* an ability-to-repay determination was an unfair and abusive practice under Section 1031.[4]

The Proposed Repeal seeks to rescind the Payday Lending Rule's mandatory underwriting provisions.[5] To justify this change of course, CFPB argues that its prior conclusions regarding the unfairness and abusiveness of payday lending (1) lacked sufficient evidentiary support;[6] and (2) were based on "problematic" interpretations of terms in Section 1031.[7] For the reasons discussed below, these justifications do not constitute a satisfactory explanation for rescinding the Payday Lending Rule. As a result, finalizing the Proposed Repeal would be arbitrary and capricious.

II. Comments on the Proposed Repeal

A. The Bureau's Section 1022(b)(2) Analysis Is Arbitrary and Capricious

Section 1022(b)(2) of the Dodd-Frank Act requires CFPB to consider the "benefits and costs of a regulation to consumers and covered persons [e.g., lenders], including the potential reduction of access by consumers to consumer financial products or services."[8] In the Proposed Repeal, CFPB claims to accept and adopt the Payday Lending Rule's economic analysis in full. However, the Proposed Repeal's analysis departs from both the Payday Lending Rule's findings and from best practices for regulatory cost-benefit analysis in unacknowledged and misleading ways. First, the Proposed Repeal highlights cost savings to lenders while ignoring forgone benefits to consumers. And second, the Proposed Repeal fails to consider or explain whether a repeal of the Payday Lending Rule will be net costly for society as a whole.

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[3] The Payday Lending Rule's underwriting requirements cover loans with terms of 45 days or less, including typical payday and short-term vehicle title loans, and longer-term balloon-payment loans. 82 Fed. Reg. at 54,772.
[4] *Id.*
[5] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. 4252 (Feb. 14, 2019).
[6] *Id.* at 4264.
[7] *Id,* at 4268.
[8] 82 Fed. Reg. at 54,814. In conducting their section 1022(b)(2) analyses, neither the Payday Lending Rule nor the 2019 Proposed Rule fully quantifies the associated costs and benefits for consumers and lenders, instead relying on "general economic principles, the Bureau's experience and expertise in consumer financial markets, . . . qualitative evidence provided by commenters, [and] data that the Bureau has collected and analyzed about millions of these loans." *Id.*; *see also* 84 Fed. Reg. at 4281.

i. The Proposed Repeal's Section 1022(b)(2) Economic Analysis Treats Benefits and Costs Inconsistently

Because CFPB accepts the Section 1022(b)(2) analysis that accompanied the Payday Lending Rule ("2017 analysis"), it claims that the economic impacts of rescinding that rule will simply be the benefits, costs, and impacts of the Payday Lending Rule inverted.[9] And yet, in its analysis of the Proposed Repeal ("new analysis"), CFPB does *not* treat all the Payday Lending Rule's costs as benefits and benefits as costs. The 2017 analysis found that the Payday Lending Rule would be net costly for lenders and net beneficial for consumers. But while the new analysis finds that repeal of the Payday Lending Rule will be net beneficial for lenders (because they will avoid the costs identified in the original analysis), it does not find that the repeal will be net costly for consumers (even though they will be deprived of the benefits identified in the original analysis). In other words, CFPB does not embrace the extant rule's Section 1022(b)(2) analysis in full, as it claims to do.[10]

This inconsistent treatment of costs versus benefits runs afoul of established case law.[11] One-sidedly considering costs or benefits is tantamount to the agency "put[ting] a thumb on the scale" and thus is arbitrary and capricious under the Administrative Procedure Act ("APA").[12] Specifically, an agency cannot "inconsistently and opportunistically frame[] the costs and benefits of the rule; fail[] adequately to quantify the certain costs or to explain why those costs could not be quantified; neglect[] to support its predictive judgments; [or] contradict[] itself."[13]

Here, CFPB's new analysis features each of these failings. The Bureau previously concluded that the Payday Lending Rule would benefit consumers by eliminating costs associated with extended loan sequences, as well as the negative effects of delinquency and default on these loans or other major financial obligations and/or the negative effects of becoming unable to cover basic living expenses as a result of the payments owed on covered loans.[14]

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[9] 84 Fed. Reg. 4282-83 (adopting the Payday Lending Rule as the baseline for evaluating the economic impacts of the Proposed Rule, considering the same information as the Payday Lending Rule's section 1022(b)(2) analysis, and declining "to revisit the specific methodologies in that analysis").

[10] *Id.* at 4284-85.

[11] *See, e.g., Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1203 (9th Cir. 2008) (finding that the agency's "decision not to monetize the benefit of carbon emissions reduction was arbitrary and capricious" where agency's regulatory analysis had monetized effects like traffic and noise); *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (holding that "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions").

[12] *Ctr. for Biological Diversity*, 538 F.3d at 1198.

[13] *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011).

[14] 84 Fed. Reg. at 4290.

But CFPB does not now treat all of those benefits as costs of the Proposed Repeal. Instead, the agency argues that loss of these benefits identified by the Payday Lending Rule

> do[es] not necessarily imply a decrease in consumer surplus. A conclusion that these impacts result in negative consumer surplus requires not just that the apparent impacts on consumers are negative, but also that these impacts were not accurately anticipated by the consumers and that consumers would have made different choices with more complete information. If these are the impacts of initiating a loan sequence for a significant share of consumers, and these impacts are not accurately anticipated (e.g., if consumers do not fully understand how long they are likely to be in debt), then economic analysis would suggest the effect on consumer surplus is likely negative. If, on the other hand, consumers making their initial borrowing decisions accurately anticipate the potential for these impacts, then the effect on consumer surplus is likely to be (at least weakly) positive, as there would be unobserved, unquantifiable, offsetting benefits.[15]

This characterization of the Proposed Repeal's effect on consumer welfare is both a marked departure from the 2017 analysis, which the Bureau claims it does not dispute, and unsupported by the information the Bureau claims to rely on. Regarding costs to consumers, CFPB claims that repealing the Payday Lending Rule will avoid a loss of access to credit, ignoring entirely its conclusion in the 2017 analysis that *beneficial* access to credit would largely be preserved under Payday Lending Rule. [16] Any loss in access to credit from the Payday Lending Rule would, the Bureau determined, be concentrated among consumers who lack the ability to repay their loans. This is precisely the desired effect of the original Rule, which found that this subpopulation of consumers experiences costly harms from short-term lending in excess of any credit benefits.[17] The Proposed Repeal questions this finding, claiming that the evidence supporting the Payday Lending Rule's findings as to effects on consumer welfare was not "sufficiently robust" and that, as a result, the Bureau need not treat the benefits to consumers that were identified in 2017 as costs

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[15] *Id.*

[16] 82 Fed. Reg. at 54,834 (finding that "the vast majority of consumers will experience minimal, if any, reduction in access to credit"); *see also id.* at 54,604 ("Based on the lack of persuasive evidence demonstrating otherwise—and in light of [features of] the rule that simplify, reduce burden, add flexibility, and ensure broader access to credit—the Bureau concludes that . . . consumers who can afford to repay covered short-term loans according to their terms will generally continue to have access to them. The Bureau thus concludes that restrictions on access to credit for borrowers who have the ability to repay will be minimal.").

[17] *Id.* at 54,841 (acknowledging that consumers who cannot satisfy the ability to repay requirement lose access to credit but maintaining that the Bureau's "summary and analysis of the related literature and empirical evidence suggests that intensive payday borrowers experienced increase welfare from reduced use of these loans").

of repeal now.[18] Yet, as discussed more fully below, CFPB cites no new or additional evidence that would support disregarding its prior findings on consumer-welfare effects.[19] On the contrary, in a summary of new studies it considered, CFPB concludes that "the new research described here *supplements, and does not contradict, the research described in the 2017 Final Rule*."[20] By its own admission, then, CFPB lacks evidentiary support for a reversal of its prior findings and thus has not provided a "reasoned explanation . . . for disregarding" the consumer benefits identified in its original analysis, which will be forgone if the Proposed Repeal is finalized.[21]

The failings of the Bureau's new analysis do not stop here. CFPB quantifies the increase in lender revenue, which it identifies as a benefit of the Proposed Repeal, without acknowledging that some portion of this revenue is also a cost from the perspective of consumers. Based on estimates provided by the Center for Financial Services Innovation, CFPB suggests that elimination of the Payday Lending Rule would translate into a $3.4 billion to $3.6 billion increase in payday lender revenue, and a $3.9 to $4.1 billion increase in vehicle title lender revenue.[22] But these figures are misleading as presented, as they fail to break out the revenue that comes from foregone compliance costs as opposed to consumer loan interest and fee payments. These interest payments and fees are merely a transfer from consumers and, by counting them as benefits on the lender side of the ledger without *also* acknowledging them as costs on the consumer side, the Bureau impermissibly "put[s its] thumb on the scale" in support of the Proposed Repeal.[23]

Finally, CFPB "contradict[s] itself"[24] by conceding that "as this proposal's increase in access to credit is concentrated in long durations of indebtedness where the, albeit limited, evidence suggest the welfare impacts are negative on average, the estimated effect on average consumer surplus from these extended loan sequences would be negative relative to the [Payday Lending Rule] baseline."[25] This concession that sequential loans to

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[18] 84 Fed. Reg. at 4285 ("It bears emphasis, however, that the 2017 Final Rule's conclusion as to these effects was dependent upon the evidence that consumers who experienced long durations of indebtedness generally did not anticipate those outcomes and, as discussed above, the agency now believes that this evidence is not sufficiently robust and representative to support the findings necessary to determine that the identified practice is unfair and abusive.").

[19] *See id.* ("In drafting this proposal, the Bureau has also considered new and additional evidence that was not available at the time of the 2017 Final Rule. . . . [T]he new studies do not affect the Bureau's analysis.").

[20] *Id.* at 4294 (emphasis added).

[21] *FCC v. Fox Television Stations*, 556 U.S. 502, 516 (2009).

[22] 84 Fed. Reg. at 4287.

[23] *Ctr. for Biological Diversity*, 538 F.3d at 1198.

[24] *Bus. Roundtable*, 647 F.3d at 1149.

[25] 84 Fed. Reg. at 4291.

consumers without the ability to repay them are net costly for consumers is at odds with the Bureau's attempt to cast consumer welfare effects as uncertain just one page earlier.[26]

Because CFPB treats costs and benefits to lenders and consumers inconsistently, its section 1022(b)(2) analysis in the Proposed Repeal violates a basic tenet of sound economic analysis: a *full* accounting of both costs and benefits is necessary for an agency to determine which regulatory alternative will maximize net benefits.[27] Finalizing the Proposed Repeal in reliance on this incomplete analysis would be arbitrary and capricious.

ii. The Proposed Repeal's Section 1022(b)(2) Analysis Fails to Establish that Repeal Is Net Beneficial

CFPB's 2017 analysis found that the Payday Lending Rule would be net costly to lenders, as a significant number were expected to exit the market altogether in response to decreased loan volumes, but net beneficial to consumers who would experience the benefits of *not* taking out covered loans that they lacked the ability to repay without, in most cases, losing access to credit.

Considered together, the "cost" to lenders in the form of lost revenue and the "benefit" to consumers in the form of avoided loan interest and fee payments constitute a transfer payment.[28] From a social standpoint, this cost and benefit are commensurate and thus entirely offsetting. Net effects from the Payday Lending Rule, then, are necessarily derived from the remaining, real costs (i.e., compliance and time costs for lenders; loss of access to credit for consumers)[29] and benefits (i.e., the avoided harms *beyond* interest and fee payments that are experienced by consumers who lack the ability to repay their covered loans and experience extended sequences of re-borrowing).[30] So long at these latter benefits outweigh the former costs, the Payday Lending Rule is net beneficial for society as a whole.

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[26] *Id., cf. id.* at 4290.
[27] *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY ANALYSIS 2 (2003) [hereinafter CIRCULAR A-4] (The "most efficient alternative" is "the alternative that generates the largest net benefits to society."); RICHARD REVESZ & MICHAEL LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 10 (2008) ("The goal of cost-benefit analysis is straightforward: It seeks to maximize the net benefits of regulation.").
[28] *See* CIRCULAR A-4 at 38 (defining "transfer payments" as "monetary payments from one group to another that do not affect total resources available to society").
[29] 82 Fed. Reg. at 54,818 (The remaining costs and benefits of the Payday Lending Rule that "manifest as administrative, compliance, or time costs; or as benefits from reductions in fraud or increased transparency" are expected "to be fairly small on a per loan/customer/lender basis.").
[30] *Id.* at 54,835 (identifying as avoided harms "the costs of delinquency and default on these loans, from the costs of defaulting on other major financial obligations, and/or from being unable to cover basic living expenses in order to pay off covered short-term and longer- term balloon-payment loans").

And indeed, this very conclusion is implicit in the 2017 analysis. CFPB acknowledged that access to credit is generally beneficial from a consumer welfare standpoint, as credit allows for consumption smoothing and absorption of unexpected financial shocks.[31] Accordingly, the Payday Lending Rule was deliberately designed to "allow for continued access to the credit that appears most beneficial—that which assists consumers with discrete, short-term needs" while also "limit[ing] the harm that may be realized by borrowers who experience long durations of indebtedness where the literature, albeit more limited, and the Bureau's own analysis and study suggest the welfare impacts of prolonged re-borrowing are negative."[32] Combining these expected effects, CFPB "concluded that the overall impacts of the decreased loan volumes resulting from the rule for consumers will be positive."[33] In other words, there are benefits to consumers above and beyond avoided loan interest payments, i.e. consumers' half of the transfer payment. By finalizing the Payday Lending Rule, the CFPB implicitly concluded that these real, non-transfer benefits to consumers justified or outweighed any real, non-transfer compliance costs for lenders.

As discussed above, the Bureau introduces no new evidence to support a finding that the conclusions of the 2017 analysis were incorrect.[34] Accordingly, CFPB cannot now reasonably conclude that the Payday Lending Rule was net costly for society and that repealing it would be net beneficial. Because it has not shown that rescinding the Payday Lending Rule will do more good than harm,[35] the Bureau has not provided a reasoned explanation for the Proposed Repeal.[36]

B. The Bureau's Critique of the Evidentiary Basis for the Payday Lending Rule Is Insufficient to Justify the Proposed Repeal

When amending, suspending, or repealing a rule, an agency must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[37] CFPB fails to do so here. Instead, the Bureau re-lists criticisms of some of the studies relied upon in the Payday Lending Rule that it already acknowledged and addressed in the original rule, points to some studies that it dismissed as methodologically deficient in 2017, and entirely ignores a substantial number of findings that supported the original rule.

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[31] *Id.* at 54,605.
[32] *Id.* at 54,818.
[33] *Id.*
[34] 84 Fed. Reg. at 4285.
[35] *See Michigan v. E.P.A.*, 135 U.S. 2699, 2707 (2015) ("No regulation is 'appropriate' if it does significantly more harm than good.")
[36] *Fox*, 556 U.S. at 516.
[37] *Id*.

The Proposed Repeal takes issue in particular with the Mann Study, which was cited in support of the Payday Lending Rule's unfairness findings. The study asked borrowers about their expectations for repayment and then compared those expectations to actual outcomes.[38] The Proposed Repeal claims that the Mann Study does not provide "a sufficiently robust and representative basis to make general findings about all lenders making payday loans to all borrowers in all States."[39] But the Proposed Repeal does not supply any argument for why the borrower outcomes could be expected to be different in other populations, or point to any evidence indicating that the outcomes are in fact different for some lenders or in some states.

The Proposed Repeal goes on to mention two industry-sponsored studies that found that the "overwhelming majority of respondents reported that when they took out their first loan they understood well or quite well how long it would take to 'completely repay the loan' and that they were able to repay their loan in the amount of time expected."[40] The Payday Lending Rule, however, addressed these studies and found them methodologically lacking because they asked participants "to describe their expectations about borrowing at some time in the past, which may lead to recall problems."[41] In addition, the Bureau expressed concerns about "sampling bias"—the survey only addressed those who had successfully paid off a payday loan. Though the Proposed Repeal admits that the Payday Lending Rule addressed, and ultimately rejected, these studies, the Proposed Repeal provides no basis for the Bureau's change in position, thus falling short of the requirement that the agency provide a "reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[42]

Finally and most importantly, the Proposed Repeal either ignores or barely addresses a number of central findings from the Payday Lending Rule, including that:

- Payday lender advertising undermines consumer understanding;[43]
- Behavioral biases serve as a barrier to consumer understanding because:
    - People under stress focus on immediate needs to the exclusion of longer-term considerations (a phenomenon known as "tunneling");[44]

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[38] 84 Fed. Reg. at 4265.
[39] *Id.* at 4265-66.
[40] *Id.* at 4266.
[41] 82 Fed. Reg. at 54,570.
[42] *Fox*, 556 U.S. at 516.
[43] 82 Fed. Reg. at 54,561 (noting that "the general positioning of short-term products in marketing and advertising materials as a solution to an immediate liquidity challenge attracts consumer facing these problems, encouraging them to focus on short-term relief rather than the likelihood that they are taking on a new longer-term debt").
[44] *Id.* at 54,570 ("Research has shown that when people are under pressure they tend to focus on the immediate problem they are confronting and discount other considerations.").

  - Consumers underestimate near-term expenditures;[45] and
  - Individuals often have unrealistic expectations about future earnings and ability to save;[46]
- Employee incentives make it more difficult for consumers to escape the cycle of debt[47] and can even undermine the effectiveness of state regulation;[48] and
- Payday lender business models depend on extensive sequences of re-borrowing.[49]

By ignoring these findings, the Bureau fails to meet its burden of supplying an explanation for disregarding the reasoning that underlay the Payday Lending Rule. Instead, the Proposed Repeal focuses overwhelmingly on the Mann Study to the exclusion of the above. The Proposed Repeal seeks to justify this lack of attention by claiming these findings "in essence, supplemented and were ultimately subordinate to the . . . Mann Study."[50] Although it is true that the Payday Lending Rule did make use of the Mann Study, it was by no means the only relevant source of information, and the Proposed Repeal cannot now ignore the other findings that the Payday Lending Rule relied on.

C. The Bureau Cannot Justify the Proposed Repeal by Inventing and Retroactively Applying a Heightened Evidentiary Standard for Rules with "Dramatic Impacts"

In an attempt to avoid meeting its burden of supplying a reasoned explanation for disregarding the findings of the Payday Lending Rule, the Bureau invents and retroactively applies a new evidentiary standard to the Payday Lending Rule. For rules with "dramatic impacts on consumer choice and access to credit," CFPB proposes to determine that it is "reasonable under the Dodd-Frank Act and prudent to have robust and reliable evidence to support key findings" and that this evidentiary burden is higher than the level that "would be sufficient to withstand judicial review under the APA."

As an initial matter, the Bureau does not explain *why* it believes application of such a heightened evidentiary standard is consistent with the text, structure, and purpose of Dodd-Frank. Nor does it provide any examples of rulemakings in which such a standard has been applied, either by CFPB or any other agency.

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[45] *Id.* ("[R]esearch shows that [consumers] tend to underestimate their near-term expenditures.").
[46] *Id.* at 54,571 (noting that consumers "may generally have unrealistic expectations about their future earnings, their future expenses, and their ability to save money to repay future obligations").
[47] *See id.* at 54,563 (noting that employees "are generally incentivized to maximize the store's loan volume and the data suggest that re-borrowing is a crucial means of achieving that goal").
[48] *See id.* at 54,564 (noting that one reason that consumers fail to utilize state-required repayment plans "may be that that certain lenders disparage the plans or fail to promote their availability).
[49] *Id.* at 54,562 (arguing that "repeated re-borrowing may be perceived as a preferred outcome for the lender or even as an outcome that is a crucial underpinning to the business model in this loan market").
[50] 84 Fed. Reg. at 4267.

But even accepting for the sake of argument that CFPB could, in 2017, have permissibly cited a heightened evidentiary standard as grounds for declining to make the key findings that underlay the Payday Lending Rule and thus declining to issue the rule, the fact remains that the Bureau did not do so. Instead, it *did* conclude that issuing covered loans without an ability-to-pay determination was an unfair and abusive practice and *did* issue the Payday Lending Rule to address this practice. As the U.S. Court of Appeals for the D.C. Circuit has explained, "the baseline for measuring the impact of a change or rescission of a final rule is the requirements of the rule itself, not the world as it would have been had the rule never been promulgated."[51] The Bureau cannot go back in time and stop itself from issuing the Payday Lending Rule in the first place; the Bureau is not working on a blank slate. The action that the Bureau must now justify is the repeal of the Payday Lending Rule, *not* the original issuance of that rule. And because repeal of the Payday Lending Rule would have "dramatic impacts" on consumers, then, according to the Bureau's own standard, the Proposed Repeal must be justified with even more evidence than standard APA review would otherwise require.

Indeed, putting aside CFPB's invented evidentiary standard, Supreme Court case law makes clear that, when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must provide "a more detailed justification than what would suffice for new policy created on a blank slate."[52] By its own admission, however, the Proposed Repeal relies largely on the same evidence as the Payday Lending Rule, and to the extent the Proposed Repeal relies on new evidence the analysis is unaffected. The Bureau states, for example, that "with the exception of the new studies discussed below, the Bureau has considered the same information as it considered in the . . . 2017 Final Rule."[53] Despite the reference to new studies, the Bureau concedes that "[t]he new research that has become available after the drafting of the 2017 Final Rule have relatively little impact on the Bureau's analysis compared to the evidence cited in the 2017 Final Rule."[54]

D. The Bureau's Conclusion that Consumers Can Reasonably Avoid Harm from Covered Loans Is Arbitrary and Capricious

For a practice to be unfair under Section 1031(c)(1)(A) of the Dodd-Frank Act, the Bureau must first have 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

[51] *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1068 (D.C. Cir. 2018).
[52] *Fox*, 556 U.S. at 515.
[53] 84 Fed. Reg. at 4,281.
[54] *Id.*

consumers."[55] The Payday Lending Rule determined that certain short-term lending practices were unfair under that standard. Drawing heavily on Federal Trade Commission ("FTC") precedent, however, the Proposed Repeal now proposes to rescind that determination. In doing so, however, the Proposed Repeal mischaracterizes both the Payday Lending Rule's position as well as the FTC precedent on which the Bureau now purportedly relies.

i. *The Proposed Repeal Mischaracterizes the Payday Lending Rule as Interpreting Reasonable Avoidability to Require Individualized Knowledge of Risk*

The CFPB characterizes the Payday Lending Rule as having determined that an injury from covered loans was not reasonably avoidable within the meaning of Section 1031(c)(1)(A) unless consumers had "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."[56] The Bureau now proposes a laxer test under which injury is reasonably avoidable if 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."[57]

But the Bureau mischaracterizes the interpretation of "reasonably avoidable" adopted in the Payday Lending Rule. While it is true that the Payday Lending Rule included some language suggesting that a generalized understanding of risk was insufficient, that language appeared in a section of the preamble in which the agency refuted commenters' suggestion that disclosures could provide an adequate substitute for the ability-to-pay requirements it eventually adopted.[58] Meanwhile, in the section of the Payday Lending Rule in which the Bureau made its unfairness finding, CFPB suggested that a granular understanding of risk was not necessary for harm to be reasonably avoidable. For example, the Bureau noted that it was not requiring that "every consumer must understand everything about the potential risks or must be able to anticipate these risks with mathematical precision."[59] Instead, the Bureau interpreted Section 1031(c)(1)(A) to require that consumers "have a *sense* of the

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[55] 12 U.S.C. 5531(c)(1)(A).
[56] 84 Fed. Reg. at 4269; *see also id.* (characterizing the Payday Lending Rule as finding that consumers "could not [reasonably avoid harm] 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 loan).
[57] *Id.* at 4270.
[58] *See* 82 Fed. Reg. at 54,637 (arguing that "generalized or abstract information does not inform the consumer of the risks of the particular loan in light of the consumer's particular financial situation" and that "generalized disclosures to consumers will not prevent the unfair and abusive practice identified above or equip consumers to avoid the harms it causes as effectively as prohibiting lenders from engaging in the unfair and abusive practice in the first instance").
[59] *Id.* at 54,594.

order of magnitude of the risk, both in terms of its likely frequency and its likely severity."[60] Further, the Bureau noted that it "interprets this criterion to mean that unless 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."[61] Moreover, the Payday Lending Rule argued that "a large number of consumers do not understand even *generally* the likelihood and severity of these risks."[62] In the Proposed Repeal, CFPB fails to provide a reasoned explanation for disregarding this prior finding regarding consumers' lack of even a general understanding of the risks of covered loans.

ii. The Proposed Repeal Invokes FTC Reasonable Avoidability Precedent, but FTC Rules Are Not as Lax as the Bureau Suggests

In determining that the reasonable avoidability standard does "not necessarily require[e] payday borrowers to have a specific understanding of their personal risks,"[63] the Proposed Repeal also mischaracterizes FTC precedent. The Proposed Repeal notes that an FTC Policy Statement "emphasizes the importance of consumer choice in unfairness analysis" and cautions against "second-guess[ing] the wisdom of particular consumer decisions."[64] However, in language that the Proposed Repeal neglects, the FTC Policy Statement continues: "it has long been recognized that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary."[65] In such cases, regulatory intervention is not meant to "second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking."[66] Indeed, the FTC Policy Statement explicitly mentions ill-informed[67] and vulnerable[68] consumers as two instances that justify regulatory intervention.

The Proposed Repeal also cites FTC enforcement action precedent as support for its use of a more general standard. The Proposed Repeal relies on an Administrative Law Judge's reasoning in *International Harvester* that "disclosure that generally alerts consumers to the

[60] *Id.* (emphasis added).
[61] *Id.* at 54,596 (emphasis added).
[62] *Id.* at 54,597-98.
[63] 84 Fed. Reg. at 4270.
[64] *Id.* at 65 (quoting 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 (1984) [hereinafter FTC Policy Statement]).
[65] FTC Policy Statement.
[66] *Id.*
[67] *Id.* (noting that "buyers with insufficient information" is a hindrance to "free market decisions").
[68] *Id.* (noting that the "exercise [of] of undue influence over highly susceptible classes of purchasers" also interferes with the proper functioning of the free market).

likelihood and magnitude of harm generally has been sufficient to avoid a finding that consumers did not appreciate the value of taking steps to avoid that harm."[69] The Proposed Repeal claims that a general disclosure in the case of *International Harvester* "would have made the injury [at issue] . . . reasonably avoidable."[70] However, on appeal to the Commission, the FTC characterized the disclosure in a much harsher light than the Administrative Law Judge, noting that the disclosure "failed to spell out the exact nature of the hazard at a level of detail that would effectively motivate compliance."[71] In other words, a general disclosure in that case was *not* sufficient.

Respectfully,

Madison Condon
Madelyn Fife
Jack Lienke
Keith Pulling

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[69] 84 Fed. Reg. at 4270.
[70] *Id.* at 4270 n.238.
[71] *Int'l Harvester*, 104 F.T.C. 949, at *84.