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March 18, 2019

SUBMITTED ELECTRONICALLY

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

RE: Consumer Financial Protection Bureau
Docket No. CFPB-2019-0007/RIN 3170—AA95

Dear Director Kraninger:

On behalf of our 500,000 members and supporters, Public Citizen submits this comment in response to the proposal of the Consumer Financial Protection Bureau (CFPB) concerning "Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance," RIN 3170-AA95 ("Delay Proposal").

Public Citizen, Inc., is a consumer-advocacy organization founded in 1971, with members in all 50 states. Public Citizen advocates before Congress, administrative agencies, and the courts for the enactment and enforcement of laws protecting consumers, workers, and the general public. Of particular relevance here, Public Citizen advocates for strong consumer-protection laws to bring fairness to consumer finance and accountability to the financial sector. Public Citizen actively supported establishment of the CFPB to serve as the first federal agency devoted to protecting the financial interests of consumers.

Public Citizen strongly opposes the CFPB's proposal to delay the compliance date for the underwriting protections in the CFPB's 2017 rule governing payday, vehicle title, and certain high-cost installment loans (2017 Rule or Rule). When implemented, these provisions will help protect consumers from an unfair and abusive practice: offering payday, vehicle title, and other similar loans without determining that borrowers have the ability to repay them. The Rule's underwriting protections are commonsense measures that will restrict this practice and help consumers avoid the injuries it causes: expensive and lengthy debt cycles, repossessed cars, closed bank accounts, and other harms. The CFPB's underwriting protections thus benefit consumers and fulfill the agency's mission to help ensure that markets for consumer financial products operate fairly.

A delay in the underwriting protections would do the opposite. By allowing lenders to continue their abusive practice, it would irreparably injure the many consumers for whose benefit the protections were promulgated. The CFPB's proposal provides no meaningful reason for delay.

That the CFPB is separately considering whether to rescind the underwriting protections permanently does not justify delay now. As an "industry protection" measure rather than a "consumer protection" one, the Delay Proposal runs counter to the CFPB's fundamental purpose: to protect consumers from harm at the hands of financial companies. The CFPB should withdraw this proposal.

I. The 2017 Rule implements the CFPB's mission by restricting a harmful lending practice and protecting consumers from the injuries that this practice causes.

Payday and vehicle-title lenders reel in financially distressed consumers with ads for quick cash.[1] But their lending practices can cause injuries that are lasting. By offering loans without assessing borrowers' ability to repay, they reach "consumers who are least able to repay the loans,"[2] and make unaffordable loans that cause substantial harm.[3] The underwriting protections in the 2017 Rule are measured provisions that significantly protect consumers from this harm and the lending practice that causes it.

A. Unaffordable loans can severely harm borrowers.

Unaffordable payday and vehicle-title loans trap consumers in inescapably harmful financial circumstances.[4] When they are faced with balloon payments they cannot afford, borrowers have just three options: "Take out additional covered loans ('re-borrow'), default on the covered loan, or make the payment on the covered loan and fail to meet basic living expenses or other major financial obligations."[5] Any of these options can cause severe injury.

Re-borrowing drives consumers into expensive, lengthy cycles of debt. Because each re-borrowing requires a new fee to delay repayment, with no reduction in principal, re-borrowing can turn a short-term, small-dollar loan into a months-long loan with no clear path to repayment and fees that quickly surpass the amount borrowed.[6] The 2017 Rule cited an example of a consumer "who paid $12,960 to borrow $1,020 in principal because the borrower continued to re-borrow the original principal."[7] Even if a consumer borrows a more modest amount of $350, re-borrowing can quickly

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[1] *See* 82 Fed. Reg. 54,472, 54,555-58 (Nov. 17, 2017) (discussing borrower characteristics); *id.* at 54,480-81, 54,488, 54,493, 54,561-62 (discussing marketing techniques).

[2] *Id.* at 54,562.

[3] *See id.* at 54,565-68 (discussing extended loan sequences), 54,572-75 (discussing delinquency and default), 54,575-76 (discussing collateral harms), 54,576-79 (discussing that harms remain under existing regulatory approaches), 54,582-83 (discussing longer-term balloon payment loans), 54,588-94 (concluding that making the relevant loans without determining that borrowers have the ability to repay them causes or is likely to cause substantial injury).

[4] The longer-term balloon payment loans covered by the underwriting provisions in the 2017 Rule are less common but "raise similar risks." *Id*. at 54,472.

[5] *See id*. at 54,472.

[6] *See generally id*. at 54,578, 54,563.

[7] *See id*. at 54,592.

lead to hundreds of dollars in extra fees, based on a typical fee of $52.50, paid every two weeks to defer repayment.[8]

Delinquency and default can lead to the loss of consumers' cars or bank accounts and other harms. Vehicle-title lenders retain the right to repossess defaulting borrowers' cars; payday lenders generally have access to consumers' bank accounts, and their pings for repayment can lead financial institutions to charge fees and close accounts.[9] Losing cars, in particular, "can seriously disrupt people's lives and put at risk their ability to remain employed or to manage their ordinary affairs as a practical matter."[10] Delinquency and default can also lead to collection efforts that "cause psychological distress and anxiety."[11] These efforts "can include harmful and harassing conduct, such as repeated phone calls from collectors to the borrower's home or place of work, the harassment of family and friends, and in-person visits to consumers' homes and worksites."[12]

The third option, paying an unaffordable loan, creates a different type of hardship. Borrowers who "feel[] compelled to prioritize payment" on unaffordable loans, to avoid repossession of their cars or for other reasons, may end up "defaulting on other obligations or forgoing basic living expenses."[13]

The injuries caused by lenders making loans without an ability-to-repay determination occur with a staggering frequency. The CFPB's research suggests:

1) When consumers take out title loans, one-third of their loan sequences end in default and one-fifth of the time, the borrowers lose their vehicles.[14]

2) More than half of the time, consumers with single-payment title loan sequences re-borrow three or more times; about a fourth of the sequences for these types of loans contain 10 or more loans.[15]

3) Twenty percent of payday loan sequences end in default, often only after the borrower has re-borrowed at least once and/or been charged bank fees.[16]

4) About one-third of payday borrowers re-borrow enough times that they pay at least 100 percent of the loan amount in fees, without reducing the principal.[17]

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[8] *See id*. at 54,565.

[9] *See id*. at 54,481, 54,488, 54,490, 54,499-501, 54,573.

[10] *Id*. at 54,573.

[11] *Id*. at 54,574.

[12] *Id*.

[13] *Id*. at 54,575.

[14] *See id.* at 54,573-74 (looking at sequence-level rates).

[15] *See id*. at 54,589.

[16] *See id*. at 54,572, 54,573.

[17] *See id*. at 54,589 (assuming typical loan terms).

5) When consumers with no outstanding payday loans take out new payday loans, about half of the time they end up re-borrowing three or more times, and about a quarter of the time, they end up with sequences of 10 or more loans.[18]

These harms can lead already vulnerable consumers deeper into financial distress. They also spill over to borrowers' families and communities. Public Citizen Litigation Group's client, Cooperative Baptist Fellowship, provided just one example in litigation. A Cooperative Baptist missionary, Scarlette Jasper, promotes economic development in poor, rural Kentucky communities where payday loans are prevalent. Her work involves providing financial education to individuals in financial crises. And because providing this help to people caught in unaffordable payday loans takes so much extra time, Ms. Jasper cannot help Kentucky communities in other ways. If less of her time were needed to help payday borrowers in distress, Ms. Jasper would be able to pursue other efforts in Kentucky communities, such as helping illiterate domestic abuse victims become self-sufficient.[19]

Lenders, for their part, depend on the results that harm borrowers. Where in "virtually every other credit market," lenders succeed when their borrowers do,[20] payday and vehicle-title lenders have built business models based on consumers' *inability* to repay their loans. CFPB research suggests that "90 percent of all [storefront payday] loan fees comes from consumers who borrowed seven or more times and 75 percent comes from consumers who borrowed 10 or more time."[21] Title lenders' business models may be even more dependent on re-borrowing.[22] Indeed, in the relevant loan markets, "[l]enders … actively encourage borrowers who they know are struggling to repay their loans" to re-borrow.[23]

B. The CFPB addressed lenders' abusive practice and the resulting harms in a measured rule that reflects Congress's intent in creating the CFPB.

The 2017 Rule is well-tailored to address lenders' practice of making loans without determining that borrowers have the ability to repay them. The CFPB released the Rule after more than five years conducting research, analysis, outreach, and supervisory and enforcement activity, and a notice-and-comment process that involved more than 1.4 million comments from consumers and consumer advocacy groups, industry associations and participants, research organizations, members of Congress, state, local, and tribal officials or agencies, faith leaders, and others.[24] Based on its years of work and following this extensive process, the CFPB concluded that in the market for covered short-term loans and longer-term balloon payment loans, lenders' practice of making

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[18] *See id*. at 54,565.

[19] *See* Declaration of Scarlette Jasper, *CFSA v. CFPB*, No. 18-cv-00295 (W.D. Tex. Sept. 19, 2018), ECF No. 45-1 at App. 7- App. 9.

[20] *See* 82 Fed. Reg. at 54,623.

[21] *Id*. at 54,484; *see also id.* at 54,489 (regarding online lenders).

[22] *See id*. at 54,494.

[23] *Id*. at 54,563.

[24] *See id.* at 54,503-19.

loans without an ability-to-repay determination not only causes or is likely to cause substantial injury to consumers but also constitutes the type of "abusive" and "unfair" practice that the agency has authority to regulate. The CFPB addressed the abusive and unfair practice in two ways.

In part, the Rule's underwriting protections address the practice directly. For certain covered short-term and longer-term balloon-payment loans, including all vehicle-title loans, the Rule requires that companies only lend money after making a reasonable determination that the borrower will be able to repay the loan according to its original terms.[25] Modified between the time of the CFPB's proposal and its 2017 Rule, these ability-to-repay requirements reflect streamlining that the CFPB described as designed to "facilitate implementation and access to responsible credit."[26]

Under the 2017 Rule, however, lenders also can make up to six covered short-term loans per year to a borrower, without an ability-to-repay determination, under certain conditions.[27] Designed with requirements that are "simpler" than assessing borrowers' ability to repay, these loans come with re-borrowing and loan-size limits that also aim to protect consumers against the harms of unaffordable loans.[28]

With these protections, the 2017 Rule is precisely the type of measure that Congress designed the CFPB to create. When Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act) in 2010,[29] the 2008 financial crisis had "destabilized the economy and left millions of Americans economically devastated."[30] "Congress studied the causes of the recession to craft solutions; it determined that the financial services industry had pushed consumers into unsustainable forms of debt and that federal regulators had failed to prevent mounting risks to the economy, in part because those regulators were overly responsive to the industry they purported to police."[31] It established the CFPB because it "saw a need for an agency to help restore public confidence in markets: a regulator attentive to individuals and families."[32]

Of particular concern to Congress at the time was regulators' failure to address lenders' weak underwriting of loans. The financial crisis "'was precipitated by the proliferation of poorly underwritten mortgages with abusive terms,' issued 'with little or no regard for a borrower's understanding of the terms of, or their ability to repay, the loans.'"[33] Congress concluded that the regulators charged with overseeing the lenders "helped bring the financial system down" by "fail[ing] … to give sufficient consideration to consumer protection."[34] They "allowed [the]

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[25] *See* 12 C.F.R. § 1041.5(b).

[26] 82 Fed. Reg. at 54,630.

[27] *See* 12 C.F.R. § 1041.6.

[28] 82 Fed. Reg. at 54,696; *see also* 12 C.F.R. § 1041.6(b)-(d); *see generally* 82 Fed. Reg. at 54,695-54,700.

[29] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[30] *PHH Corp. v. CFPB*, 881 F.3d 75, 77 (D.C. Cir. 2018) (en banc).

[31] *Id*.

[32] *Id.*

[33] *Id.* at 80 (quoting S. Rep. No. 111-176, at 11-12 (2010)).

[34] *Id.* (quoting S. Rep. No. 111-176 at 166).

deterioration in underwriting standards to take place in part to prevent the institutions they regulate from getting priced out of the market."[35]

Seeking an end to the market abuses and regulatory failures that led to the crisis, Congress created the CFPB as an independent agency focused on consumer protection.[36] It required mortgage lenders "to establish that consumers have a reasonable ability to repay at the time the mortgage is consummated," enacted other mortgage market reforms, and charged the new agency with implementing the new measures.[37] More broadly, Congress assigned the new agency authority to protect consumers against a wide range of other unfair, deceptive, or abusive acts and practices. The Dodd-Frank Act identifies protecting consumers from such acts and practices as one of the agency's core objectives, and enables the CFPB to address unfair, deceptive, or abusive acts and practices through rulemaking, as well as other action.[38]

In giving the CFPB this and other authority, Congress recognized the need for consumer protection measures that address products other than mortgages. And it singled out payday loans for special attention. Congress designated payday lenders as one of just a handful of types of non-bank entities for which the CFPB generally has "exclusive authority" to conduct supervisory examinations, write rules, or "enforce Federal consumer financial law."[39] The Senate Report on the Dodd-Frank Act suggests why. It explains that "[a]busive lending, high and hidden fees, unfair and deceptive practices, confusing disclosures, and other anti-consumer practices have been a widespread feature in commonly available consumer financial products."[40] It then goes to discuss payday loans as one of five areas of concern.[41] These loans, the Senate found, are generally used by "[c]ash-strapped consumers who … are usually in significant debt or living on the financial edge," and they "put[] many consumers on a perpetual debt treadmill where they extend the loan several times over"; further, the Senate report notes, "[i]f the borrower defaults on the loan, serious financial consequences can occur."[42]

The underwriting protections in the CFPB's 2017 Rule apply the agency's authority regarding unfair, deceptive, and abusive practices to address the cause of the payday lending harms that Congress identified. And when fully implemented, the underwriting protections will provide substantial benefits to consumers. Because of their tailored approach, the protections will "reduc[e] the harm [consumers] suffer from the costs of extended sequences of payday loans and single-payment auto-title loans, from 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

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[35] S. Rep. No. 111-176 at 14.

[36] *See id.* at 11; *see also PHH Corp.*, 881 F.3d at 80-81.

[37] H.R. Conf. Rep. No. 111-517, at 876 (2010); *see also id.* at 877-78; *see generally* Dodd Frank Act, tit. XIV & § 1400.

[38] *See* 12 U.S.C. §§ 5511(b)(2), 5531, 5536(a)(1).

[39] 12 U.S.C. § 5514(a)(1)(E), (c), (d).

[40] S. Rep. No. 111-176 at 17.

[41] *See id.* at 17-23.

[42] *Id.* at 20, 21.

expenses in order to pay off covered short-term and longer-term balloon-payment loans."[43] In its Delay Proposal, the CFPB focuses on the changes in payday and vehicle-title lending that the 2017 Rule will cause;[44] because the Rule limits an unfair lending practice and the harms that it causes, for consumers, the overall "welfare impacts" of these changes will be "positive."[45]

II. The proposed delay will cause severe injury to consumers and is not justified.

The 2017 Rule gave lenders a 21-month compliance period—six months longer than originally proposed—to "balance giving enough time for an orderly implementation period against the interest of enacting protections for consumers as soon as possible."[46] This balance remains unchanged. As the CFPB previously concluded, "a substantial population of borrowers is harmed, many severely, when they suffer the kinds of injuries" caused by lenders making covered short-term and longer-term balloon-payment loans without determining that borrowers have the ability to repay them.[47] Now, as then, implementation of the 2017 Rule "as soon as possible" is important to reduce this harm. Delay will severely and irreparably injure consumers by allowing lenders to continue their unfair and abusive practice, without the 2017 Rule's restrictions. The CFPB has not justified delay of the August 2019 compliance date.

In the Delay Proposal, the CFPB asserts that it can lessen the weight it assigns to the interest of enacting protections "as soon as possible" because it "preliminarily believes that there are strong reasons for rescinding" the underwriting protections.[48] That the CFPB, under new leadership, is now questioning the conclusions of its own prior rulemaking, however, does not change consumers' interest that protections be put in place "as soon as possible." Although the CFPB now blithely attempts to re-characterize the 2017 Rule's underwriting protections by describing them as "restrictions on consumers' ability to choose to take out covered loans,"[49] *nothing* in the Delay Proposal questions the benefits to consumers that the CFPB already concluded those protections will provide. To the contrary, the Delay Proposal implicitly acknowledges such benefits, by recognizing that a compliance-date delay will lead consumers to suffer the reverse effect, including: increased risk of harm from extended loan sequences, delinquency and default, and the consequences on other obligations of paying off an unaffordable loan.[50]

Moreover, the August 19, 2019 compliance date does not interfere with "orderly implementation." Industry participants have been aware of the compliance date for nearly 18 months. The CFPB

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[43] 82 Fed. Reg. at 54,835.

[44] *See* 84 Fed. Reg. at 4300 (referencing changes to lending operations and "restricting consumer access to credit").

[45] 82 Fed. Reg. at 54,817.

[46] *Id*. at 54,813-14.

[47] *Id.* at 54,591.

[48] 84 Fed. Reg. at 4301-02.

[49] *See id*. at 4303.

[50] *See id.* at 4302 (recognizing that the Rescission Proposal's impacts—and thus those of the Delay Proposal—are "based on the analysis and conclusions reached in the 2017 Final Rule" and that the Delay Proposal's effects include "a negative average welfare effect on consumers"), 4303-04 (listing costs to consumers of delaying the Underwriting Protections).

does not suggest otherwise, choosing instead to seek comment on whether a later compliance date would *also* be consistent with orderly implementation.[51]

Notably, the Delay Proposal largely ignores these two factors identified in the 2017 Rule, and explains the reasons it seeks to delay the 2017 Rule's underwriting protections without reference to the balance between "enacting protections … as soon as possible" and "orderly implementation."[52] The agency buries its only discussion of this balance under the heading "Legal Authority."

A. The CFPB's pending proposal to rescind the underwriting protections does not justify a delay in compliance.

In introducing the proposed delay, the CFPB cites its "preliminar[y] belie[f]" that "there are strong reasons for rescinding" the underwriting protections.[53] The possibility that the 2017 Rule may be revised does not justify a compliance date delay.

To begin with, years of CFPB original research, supervisory and investigative data, consumer complaints, secondary research, and other sources show that lenders making the relevant loans without determining that borrowers have the ability to repay them is an unfair and abusive practice that harms consumers.[54] The CFPB's separately issued proposal to rescind the underwriting protections (Rescission Proposal) downplays much of this information to focus on critiquing two studies—a focus that suggests nothing more than an attempt to rationalize a policy result that the CFPB had already chosen. Similarly, the Rescission Proposal's suggestions to re-define the terms "abusive" and "unfair" rest on mischaracterizations of the 2017 Rule's interpretation and application of the relevant statutory terms and ignore a key aspect of payday and vehicle-title lenders' practice: When consumers receive unaffordable loans, they generally have no option to avoid the harm that results. Similarly to the weak mortgage underwriting practices that preceded the Dodd-Frank Act, making payday, title, and similar loans without determining that borrowers have the ability to repay them is a practice that is unfair and abusive under any common-sense meaning of these terms.

More importantly, that the CFPB seeks, in a separate proposal, to reconsider the reasons for the underwriting protection does not justify delaying those protections now. "Agencies regularly reconsider rules" and such reconsideration "does not simultaneously convey authority" to delay the existing rule.[55] The CFPB cites the "opportunity to review comments on" the Rescission Proposal and its desire to change the 2017 Rule before industry bears any compliance costs,[56] but those cannot justify a delay when the CFPB "nowhere explains how the [implementation] of" the underwriting protections "would prevent [the agency] from undertaking notice and comment or

[51] *See id.* at 4302.

[52] *See id*. at 4301.

[53] *Id*. at 4300.

[54] *See generally* 82 Fed. Reg. at 54,533-54,624.

[55] *Air All. Houston v. EPA*, 906 F.3d 1049, 1065 (D.C. Cir. 2018) (per curiam).

[56] 84 Fed. Reg. at 4300.

other tasks for reconsideration, why a delay is necessary" to the CFPB's process, or how the on-schedule implementation of the underwriting protections "would otherwise impede its ability to reconsider" the 2017 Rule.[57]

Indeed, delaying the underwriting protections would amount to an early adoption of the rescission that the CFPB has separately proposed. The CFPB cannot legally implement that rescission without seeking and considering comments on its merits.[58] That is not what the CFPB is purporting to do in the Delay Proposal.

For similar reasons, the CFPB's references to the 2017 Rule's implementation and compliance costs, including potential market exit and "changes to [lenders'] businesses," and the purported negative impact of "industry disruption" on consumers, cannot justify the proposed delay.[59] In discussing the agency's reasons for a delay, the proposal entirely ignores that the Rule will benefit consumers by reducing the harms they suffer from loans made without an ability-to-repay determination and that the decline in lending will generally be "positive for consumers."[60] It also does not provide any "new information" about the underwriting protections' impact.[61] Rather, the referenced potential effects appear to be a cherry-picked and incomplete list of concepts from those that the CFPB previously considered, when it extensively analyzed the 2017 Rule's anticipated costs, as well as its benefits.[62] Highlighting those that weigh in favor of the CFPB's preferred result, without considering the Rule's benefits, acknowledging other relevant context, or suggesting that anything has changed about the Rule's expected impact since it was released, is just another way for the CFPB to say: "we want to change our mind." Indeed, the CFPB asserts that the delay would "avoid" the cited effects,[63] but the underwriting protections' benefits and costs will only be "avoided" if the CFPB *also* adopts its proposal to rescind those provisions

[57] *Air All.*, 906 F.3d at 1067 (holding that EPA rule that delayed an earlier rule's effective date pending reconsideration of that earlier rule was arbitrary and capricious because it lacked such a showing, when among the EPA's asserted reasons for the delay was allowing "time for a comprehensive review of objections" to the earlier rule "without imposing the rule's substantial compliance and implementation resource burden when the outcome of the review is pending," *id.* at 1060); *see also Council of Parent Attorneys & Advocates, Inc. v. DeVos*, No. 18-cv-1636 (TSC), __F. Supp. 3d__, 2019 WL 1082162, at *17 (D.D.C. Mar. 7, 2019) (rejecting agency's assertion that it could delay the compliance date of its own rule because it wanted to review an aspect of the earlier rule "before States are required to implement the regulations rather than during implementation"). Importantly, the length of the proposed delay does not even square with the reason the CFPB suggests for such delay. The proposed delay would last until about 21 months after the CFPB issued the Rescission Proposal. But the CFPB should be able to finalize its notice-and-comment period more quickly. The CFPB finalized the 2017 Rule 16 months after proposing it, and that rule, unlike the Rescission Proposal, addressed two unfair and abusive practices, considered multiple policy options, and synthesized more than 1.4 million comments with five years of the CFPB's research.

[58] *Cf. Air All.*, 906 F.3d at 1065 (holding that "EPA may not employ delay tactics to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule on the merits").

[59] *See* 84 Fed. Reg. at 4300.

[60] 82 Fed. Reg. at 54,817; *see also id.* at 54,598-612 (concluding that the injury caused by lenders making loans without an ability-to-repay determination is not outweighed by countervailing benefits of that practice to consumers or competition).

[61] *Council of Parent Attorneys*, 2019 WL 1082162, at *16.

[62] *See generally* 82 Fed. Reg. at 54,814-46.

[63] 84 Fed. Reg. at 4300.

permanently. Again, the lawful process for the agency to change its mind on the underwriting provisions is through rulemaking, on a full record and after consideration of the views of all stakeholders.

B. Industry complaints about compliance do not justify delay.

In 2017, the CFPB established a 21-month implementation period that was longer than what it originally proposed but shorter than what some commenters sought.[64] Industry participants' renewed requests for more time do not justify further extension of this lengthy implementation period. And because the industry complaints that the CFPB recites bear no relationship to the 15 months of delay that the agency proposes, its focus on these issues appears to be an attempt to support a result the agency has already determined.

1. State laws are no reason to delay the nationwide underwriting protections.

The CFPB notes that since it issued the 2017 Rule, three states have passed lending laws. It states that "[s]ome industry participants" have decided to prioritize compliance with those state laws over compliance with the CFPB's Rule and others have represented that they cannot implement both sets of laws at once.[65] But compliance with state law—just like compliance with other federal law—is a standard part of payday- and title-lending businesses. It is not an excuse for non-compliance with the CFPB's federal protections.

As an initial matter, stepping back from nationwide consumer protections because *three* states have enacted new laws is illogical. As the CFPB noted just two years ago, because state law has failed to prevent lenders' unfair and abusive practice of making loans without determining that borrowers have the ability to repay them and the harms that result from this practice, "there is a need to adopt minimum Federal standards that apply consistently across all … States."[66] Indeed, in the 2017 Rule, the CFPB expressly rejected the suggestion that it should "exempt entities operating in any given State on the basis of the given State's laws."[67] And consistent with the Dodd-Frank Act, it explained that the Rule would operate as a floor, not a ceiling, on consumer protection.[68] What the CFPB proposes now would turn the CFPB's earlier reasoning on its head by allowing laws in three states to erase consumer protections nationwide, for more than a year.[69]

Moreover, the suggestion that changes in state law "were not anticipated" and thus justify a nationwide rollback of consumer protections is incorrect.[70] Appropriately, when the CFPB issued the 2017 Rule, it expressly recognized that state law would continue to change. It noted that

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[64] *See id*. at 54,813-14.

[65] 84 Fed. Reg. at 4300 & n.17.

[66] 82 Fed. Reg. at 54,639.

[67] *Id.*

[68] *See id.* at 54,522; *see generally* 12 U.S.C. § 5551(a) (Dodd-Frank preemption provision applicable to the CFPB).

[69] Notably, the CFPB does not appear even to have analyzed whether those states' laws would provide in their own states the protections guaranteed by the CFPB's Rule.

[70] 84 Fed. Reg. at 4300.

"lenders will … need to comply with more restrictive State laws as applicable," explaining that it "trusts that [state legislatures] will advance their own policy goals," and emphasizing that "States are free to engage in further regulation of covered loans as they may determine to be appropriate."[71] Further, the agency reviewed state regulation of payday lending in depth and, in doing so, reflected states' continued willingness to legislate in this area; among other things, the CFPB noted several states' laws that had only recently been passed, including a New Mexico restriction on payday lending that would go into effect after the CFPB issued the Rule.[72]

The CFPB's attempt to use state law to question the compliance date of its own Rule is particularly flimsy in light of the Colorado, Ohio, and Florida laws that the Delay Proposal names. In Colorado, for example, the available evidence shows that lenders are no longer making loans that are subject to the 2017 Rule's underwriting protections. In 2010, Colorado prohibited the short-term payday loans that would have been addressed by the underwriting protections.[73] After that law was passed, lenders could make longer-term payday loans, but they virtually never structured those loans with balloon payments, which would have made them subject to the underwriting protections.[74] Now, the 2018 Colorado law that the Delay Proposal references has caused lenders to exit the market for longer-term payday lending altogether.[75] Thus, Colorado lenders are not struggling to implement two new sets of protections applying to the same loans; due to their exit from the relevant markets, they will not be implementing the CFPB Rule's underwriting protections in Colorado at all. Moreover, because the Colorado law has already taken effect, just months after it was passed, it cannot justify a 15-month delay in lenders' compliance obligations nationwide.[76]

The CFPB's assertions about Ohio law likewise do not support a delay. The CFPB focuses on that law's ban on certain loans. Similarly to the Colorado law, such a ban will be in effect shortly and may require lenders to stop making certain loans altogether,[77] but it does not require simultaneous implementation of state and federal protections applying to the same loans.

Finally, Florida's new law does not justify a delay in the compliance date for the CFPB Rule's underwriting protection. That law was passed at the behest of industry lobbyists seeking to find

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[71] 82 Fed. Reg. at 54,699 & n.862.

[72] *See id.* at 54,484-86; *see also id.* at 54,490-91 (similar, regarding title loans), 54,576-79 (further discussion of state law).

[73] *See id.* at 54,496 (describing 2010 Colorado law). Auto-title loans are not legal in Colorado. *See* Pew Charitable Trusts, *Auto Title Loans, Market Practices and Borrowers' Experiences* 4 (2015), https://www.pewtrusts.org/~/media/assets/2015/03/autotitleloansreport.pdf.

[74] *See* 82 Fed. Reg. at 54,496 n.255; *Colorado Payday Lending – Demographic And Statistical Information* 15 (2016) (government report stating that 99.96 percent of such loans involved installment payments, not single "balloon" payments).

[75] *See* Andrew Villegas, *With New Limits on Interest, Colorado's Payday Lenders Could Soon Close*, Colorado Public Radio (Jan. 31, 2019), https://www.cpr.org/news/story/with-new-limits-on-interest-colorado-s-payday-lenders-could-soon-close (predicting market exit); *see also* 84 Fed. Reg. at 4254 n.27 (Rescission Proposal, suggesting that interest rate cap will end payday lending in the state).

[76] *See* 84 Fed. Reg. at 4300 n.17 (describing law).

[77] *See id.*; *see also* 84 Fed. Reg. at 4254 n. 26 (Rescission Proposal, stating that Ohio law "will effectively prohibit short-term payday and vehicle title lending").

ways *around* the 2017 Rule. Understanding that the CFPB's underwriting protections focus on loans that are 45-days in length or shorter, the Florida law aimed to expand lenders' ability to offer longer-term loans that are outside the scope of the federal requirements. One payday lender explained: "We had to find a way to work within the path that the CFPB allowed us."[78] The CFPB's proposal would reward this attempt to get around the agency's own requirements by excusing lenders entirely, at least for an extra 15 months. This result is not only incongruous, but also in tension with the Dodd-Frank Act and the 2017 Rule itself, which notes an objective of *preventing* evasion of the CFPB's rule.[79] Further, by design, the Florida law applies to loans that are *outside* the reach of the CFPB's underwriting protections. It is also permissive, not mandatory, as the CFPB describes it.[80] Thus, it also does not require any company to implement the CFPB Rule and new state law to the same loans, or even at the same time. Lenders concerned about limited compliance resources could implement the CFPB's 2017 Rule by August 19, 2019, and then decide whether or on what timeline they want to take advantage of the new Florida loan options.

2. Lenders' complaints about their vendors do not justify delay.

Industry's other implementation complaints also do not warrant a delay in the underwriting protections. That some industry participants want a compliance period longer than the current 21 months is "not new information to the government, which was aware of [these risks] when drafting" the 2017 Rule.[81] The CFPB established a 21-month implementation period and concluded it appropriately balanced the interests in "orderly implementation" and implementation "as soon as possible," while recognizing that some commenters estimated industry would need "years" to come into compliance.[82]

Moreover, though the CFPB states that some companies have complained about some *other* companies—software vendors —not being "fully operational or available" by August 19, 2019, and mentions other complaints about the slow development of systems that would "facilitate" lenders' work,[83] the CFPB does not suggest that any lender is actually unable to comply with the underwriting protections by August 19, 2019—let alone that any lender thus needs an additional *15 months* to finish necessary system changes.

Further, publicly available information suggests lenders will be ready for the August 19, 2019 compliance date: In litigation over the 2017 Rule, for example, the CEO of Advance America, described as "a leading cash advance company in the United States, with more than 2,000 stores

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[78] Yuka Hayashi, *Florida Gives Payday Lenders a Boost*, Wall Street Journal (Mar. 19, 2018), https://www.wsj.com/articles/florida-gives-payday-lenders-a-boost-1521503621; *see generally* 12 C.F.R. §§ 1041.2(7), (10), 1041.3(b)(1)-(2) (defining covered short-term loans and covered longer-term balloon payment loans); *id.* § 1041.4 (identifying unfair and abusive practice only with regard to these categories of loans).

[79] *See* 12 U.S.C. § 5512(b)(1) (allowing the CFPB to prescribe rules to prevent evasions of Federal consumer financial laws); 12 C.F.R. §§ 1041.5(e), 1041.13 (prohibiting lenders' evasion attempts).

[80] *See* Yuka Hayashi, *Florida Gives Payday Lenders a Boost*, Wall Street Journal (Mar. 19, 2018); *see also* 84 Fed. Reg. at 4300 n.17 (describing the law).

[81] *Council of Parent Attorneys*, 2019 WL 1082162, at *16.

[82] *See* 82 Fed Reg. at 54,813-14.

[83] 84 Fed. Reg. at 4300.

in twenty-eight states," discussed the company's efforts "to ensure that it can operate in compliance" with the 2017 Rule by the August 2019 compliance date and offered no hint of compliance challenges.[84] Similarly, publicly traded payday-loan companies discussed the 2017 Rule and related developments in recent filings, without suggesting that they anticipated not being able to meet the compliance deadline.[85]

Importantly, delaying the underwriting protections is a substantive change to the CFPB's rule that requires notice-and-comment rulemaking under the Administrative Procedure Act.[86] It would be a perversion of this process if lenders and the CFPB could together create a self-fulfilling prophecy: new CFPB leadership announces it might change a rule promulgated by the agency's former leadership; lenders and vendors delay compliance; and then the CFPB delays the requirements of the rule because lenders and vendors delayed complying.

C. The CFPB provides no reason to change section 1041.11.

The CFPB proposal would change the compliance date for section 1041.11. But the agency has not identified any reason for changing that provision. Section 1041.11 allows companies to apply to become registered information systems: the entities that will receive data about consumers' outstanding loans and provide that information to lenders to use in complying with the 2017 Rule's underwriting protections. Unlike the rest of the 2017 Rule, section 1041.11 was set to be fully effective and implemented as of January 16, 2018.[87] What the CFPB has proposed, therefore, is not a delay but a full reversal, without any reasoning that would apply to this provision or a discussion of the impact. In particular, concerns about industry compliance costs and timelines are irrelevant to section 1041.11. The provision does not impose any mandatory implementation costs but rather provides a framework for entities to create, if they choose, a new business to serve lenders. Further, pursuant to section 1041.11(c)(3), the CFPB has already granted indefinite waivers of the only deadline listed in section 1041.11, for applying for pre-August 19 preliminary approval.[88]

The CFPB also has not provided any reason that it should shutter its own system for processing the applications of companies seeking to become registered information systems. Indeed, the CFPB's encouragement and processing of these applications would help lenders take advantage of section 1041.6; that provision allows loans without underwriting but requires the existence of a

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[84] Declaration of J. Patrick O'Shaughnessy in Support of Plaintiffs' Motion for Preliminary Injunction 1, 2, *CFSA v. CFPB*, No. 18-cv-295 (W.D. Tex. Sept. 14, 2018), ECF No. 42-3.

[85] *See* FirstCash, Inc. Annual Report 13, 23 (Form 10-K) (Feb. 5, 2019), https://ir.firstcash.com/static-files/633807ec-40f1-44ec-aec3-5f78e3b9ea4c; Enova International, Inc. Annual Report 14, 20-21 (Form 10-K) (Feb. 27, 2019), http://ir.enova.com/sec-filings# (with link to filing).

[86] *See Clean Air Council v. Pruitt*, 862 F.3d 1, 6, 8-9, 14 (D.C. Cir. 2017) (vacating agency stay of its own rule announced without notice-and-comment rulemaking).

[87] *See* 82 Fed. Reg. at 54,472.

[88] *See* CFPB, *Payday, Vehicle Title, and Certain High-Cost Installment Loans Registered Information Systems Registration Program*, https://www.consumerfinance.gov/policy-compliance/guidance/payday-loans-registered-information-systems-registration-program/registered-information-systems/ (including waiver letters posted on this website).

registered information system.[89] If the CFPB instead stalled the registered-information-system application-process, that decision would suggest that the CFPB has pre-judged the outcome of its Rescission Proposal.

III. This rulemaking suggests a pre-judged result and shortcuts legal requirements.

In this rulemaking, as in any, the CFPB must comply with procedural requirements "intended to … provide fair treatment for persons affected by" the proposal,[90] including by "disclos[ing] in detail the thinking that has animated the … proposed rule," seeking comment, "respon[ding] to significant points," and doing so with an open mind.[91] The CFPB's rushed effort to delay and then repeal the underwriting protections raises serious questions about the extent to which the CFPB will consider relevant information. The Delay Proposal also fails to follow other rulemaking requirements. Although Public Citizen urges the CFPB to withdraw the proposal, if it proceeds, the agency should re-issue its proposal with fuller explanation and in compliance with rulemaking requirements.

A. The CFPB's efforts to undermine the 2017 Rule suggest it lacks an open mind.

Since its leadership changed in late 2017, the CFPB has consistently and forcefully sought to undermine the 2017 Rule. The history of the CFPB's actions against its own rule strongly suggests that the agency has pre-judged the Delay Proposal's outcome.

Mick Mulvaney showed his opposition to the 2017 Rule within days of becoming the CFPB's acting director. In a December 4, 2017 press conference, he explained that he had asked his staff for options to "deal with" it and expressed support for a Congressional Review Act resolution to void it.[92]

About six weeks later, on January 16, 2018, two important deadlines arrived for the 2017 Rule. First, the Rule became effective on that date. Although lenders were not required to implement the Rule's principal requirements until August 19, 2019, the extended compliance period did not apply to section 1041.11, the provision that allows entities to apply to become registered information systems.[93] Second, Mr. Mulvaney, in his role as director of the White House Office of Management and Budget (OMB), was due to take action on core aspects of the 2017 Rule. January 16, 2018 was the statutory deadline for OMB to decide on the Paperwork Reduction Act (PRA) request incorporated into the Rule.[94] This deadline was important because under the PRA, government agencies generally must receive OMB approval of their PRA requests—and an OMB-assigned

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[89] *See* 12 C.F.R. § 1041.6(a).

[90] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977).

[91] *Id*; *see also McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1323, 1325 (D.C. Cir. 1988).

[92] *See* Exhibit 5, CFPB Press Roundtable 3-4 (December 4, 2017), *English v. Trump*, No. 17-cv-02534-TJK (D.D.C. Dec. 18, 2017), ECF No. 41-5.

[93] *See* 82 Fed. Reg. at 54,472.

[94] *See* 5 C.F.R. § 1320.11(h) (setting 60-day deadline after Federal Register publication for the OMB to decide upon a PRA request submitted with an agency rule).

control number—before they can require certain collections of information.[95] The 2017 Rule's PRA request covered central aspects of the Rule, including: (1) the requirements for lenders to collect certain information to assess borrowers' ability to repay; (2) the requirement for lenders to share information with registered information systems; (3) the requirement for lenders to retain loan documentation; (4) the requirement that lenders provide certain notices to borrowers, as part of the underwriting protections *and* other aspects of the 2017 Rule; and (5) the application requirements for entities seeking to become registered information systems.[96]

On January 16, 2018, instead of advancing implementation of the 2017 Rule, Mr. Mulvaney, in his role as OMB Director, *declined* to make a decision on the PRA request submitted with the 2017 Rule, with no announcement about that non-action decision, his reasons for it, or its impact.[97] Also on January 16, the CFPB announced its intent to "reconsider" the 2017 Rule through rulemaking.[98] And rather than encouraging entities to take advantage of section 1041.11, the CFPB invited entities to seek a waiver of a deadline under that provision, which was for entities to seek preliminary approval to become registered information systems *before* lenders had to implement the rest of the Rule.[99]

Several months later, in May 2018, after Congress did *not* void the 2017 Rule under the Congressional Review Act,[100] the CFPB turned to the court for action.[101] The prior month, two industry associations had sued the CFPB seeking to overturn the Rule. On May 31, 2018, the CFPB joined with the industry plaintiffs and asked the court to stay the Rule, such that it would no longer be implemented in August 2019. The joint motion stated that "[a] stay of the compliance date is particularly appropriate because the CFPB's decision to initiate rulemaking to reconsider the [Rule] creates inherent uncertainty." But it also asked the court to delay the rule's compliance date until long after the CFPB finished any such new rulemaking.[102]

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[95] *See generally id.* § 1320.5(a)(2), (3).

[96] *See* 82 Fed. Reg. at 54,871 (describing Paperwork Reduction Act request incorporated into the 2017 Rule).

[97] *See generally* 84 Fed. Reg. at 4305.

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

[99] *See* 12 C.F.R. § 1041.11(c)(3). The CFPB subsequently issued waivers that are indefinite and has never since given entities seeking to become registered information systems a date by which to apply. *See* CFPB, *Payday, Vehicle Title, and Certain High-Cost Installment Loans Registered Information Systems Registration Program*, https://www.consumerfinance.gov/policy-compliance/guidance/payday-loans-registered-information-systems-registration-program/registered-information-systems/ (including waiver letters posted on this website).

[100] *See* Sarah O'Brien, *Time Runs Out for Congress to Upend Payday Lending Rule*, (May 17, 2018), https://www.cnbc.com/2018/05/17/time-runs-out-for-congress-to-overturn-consumer-bureaus-payday-lending-rule.html.

[101] Public Citizen, Inc. has appeared as an amicus in this litigation. Public Citizen Litigation Group is representing Cooperative Baptist Fellowship, which is seeking to intervene in this litigation to defend the Rule.

[102] *See* Joint Motion for Stay of Litigation and Stay of Agency Action Pending Review 4, *CFSA v. CFPB*, No. 18-cv-295 (W.D. Tex. May 31, 2018), ECF No. 16. The request asked the court to delay the litigation until after the CFPB finished a new rule, and then to delay the current Rule until 445 days after the end of the *litigation*. *See id.* at 1.

In August 2018, the CFPB renewed its argument to the court, after the judge denied the May request for a stay of the Rule.[103] In support of a motion for reconsideration by industry plaintiffs, the CFPB filed a lengthy memorandum that (a) expressed support for industry's arguments *against* the agency's rule, contending that the industry plaintiffs had a "substantial case on the merits," (b) complained of the costs that *industry* would bear from having to implement the new requirements, (c) stated that it, as an agency, would not be harmed by its own rule being delayed because it intended to "reconsider" it, and (d) dismissed the harm that consumers would suffer from delayed implementation as "uncertain" due to its own intent to reconsider the 2017 Rule.[104]

Like the June motion, the August request to stay the 2017 Rule's compliance date was denied.[105] After the court twice refused to delay the Rule, the CFPB announced that it intended to issue a rulemaking proposal regarding the Rule's compliance date.[106] In light of that announcement, the court decided to stay that date.[107]

This background strongly suggests that the CFPB decided to delay the underwriting protections long before it issued the Delay Proposal; it appears that the CFPB turned to notice-and-comment rulemaking only because its efforts to do so without notice-and-comment failed. The Delay Proposal's barebones analysis and its suggestion that the CFPB will finalize a rule quickly—in time for it to become effective by August 19, 2019—strengthen the impression that the CFPB has already decided on a course of action.

B. In its rush to judgment, the CFPB has taken improper regulatory shortcuts.

1. The Delay Proposal exaggerates the impact of the underwriting protections on businesses and omits other key details.

The Delay Proposal omits critical facts and details of the agency's thinking and analysis, and thus does not provide sufficient notice and an opportunity to comment.[108] Most importantly, the proposal relies on estimates of the 2017 Rule's negative impact on industry that are overstated in ways that the CFPB does not explain. These estimates are central to the CFPB's proposal, which focuses on protecting industry from bearing those costs. The CFPB's omissions in this regard

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[103] *See* Order, *CFSA v. CFPB*, No. 18-cv-295 (W.D. Tex. June 12, 2018), ECF No. 29.

[104] Response in Support of Plaintiffs' Motion for Reconsideration 10-19, *CFSA v. CFPB,* No. 18-cv-295 (W.D. Tex. June 22, 2018), ECF No. 34.

[105] Order, *CFSA v. CFPB*, No. 18-cv-295 (W.D. Tex. Aug. 28, 2018), ECF No. 39.

[106] CFPB, *Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date* (Oct. 26, 2018), https://www.consumerfinance.gov/about-us/newsroom/public-statement-regarding-payday-rule-reconsideration-and-delay-compliance-date/.

[107] *See* Order 2-3, *CFSA v. CFPB*, No. 18-cv-295 (W.D. Tex. Nov. 6, 2018), ECF No. 53.

[108] *See generally Connecticut Light & Power Co. v. Nuclear Reg. Comm*., 673 F.2d 525, 528, 530-31 (D.C. Cir. 1982) (regarding the Administrative Procedure Act's notice-and-comment requirements); *Home Box Office, Inc.*, 567 F.2d at 35 (similar); *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 265 (D.D.C. 2015) (similar).

undermine both its attempt to estimate the proposed delay's benefits and its reliance on those benefits in explaining why a delay is necessary.[109]

The key figures come from the 2017 Rule, in which the CFPB estimated, in numeric terms, how the underwriting protections would affect industry loan volume and revenues. Those estimates showed loan and revenue losses, and the Delay Rule relies on them to estimate the reverse effect: loan volume and revenue that lenders would preserve if the CFPB stalls implementation of the underwriting protections.[110] The 2017 figures, however, overstate the Rule's negative impact on lending because, as the CFPB explained then, the agency modeled what would happen if lenders implemented the underwriting protections but made no other changes to their practices. The resulting estimates of lost loan volume and revenue thus did "not account for lenders making changes to the terms of their loans to better fit the regulatory structure or offering other products, for instance by offering a longer-term vehicle title loan with a series of smaller periodic payments instead of offering a short-term vehicle title loan."[111]

Lenders' efforts to adjust their businesses around the 2017 Rule's requirements are difficult to model, but nevertheless "quite likely"[112] and thus very relevant to the Delay Proposal, which principally responds to industry's revenue concerns, with little consideration of consumer interests. In 2017, the CFPB recognized payday lenders' past efforts to change their products to minimize the impact on their businesses of other federal and state requirements.[113] And since the 2017 Rule, lenders have shown that they similarly intend to adjust their products to lessen the effect of the underwriting protections on their bottom lines. In the litigation regarding the 2017 Rule, Advance America, the payday- and title-lender with stores in 28 states, explained through a declaration of its CEO that it planned to migrate customers to "alternative loan products" rather than payday and title loans, including by advocating for changes in state law to permit them to offer more such products.[114] The new Florida law that the Delay Proposal highlights is one such change in state law: it was specifically designed to enable lenders to structure loans that fall outside the reach of the 2017 Rule's underwriting protections.[115]

Unlike the 2017 Rule, however, the Delay Proposal does not explain these "likely" industry dynamics and that they will reduce the estimated industry losses from the 2017 Rule. Without the clearly explained qualifications that the CFPB recognized in the 2017 Rule, the CFPB's discussion

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[109] *See* 84 Fed. Reg. at 4300 (referencing allowing industry to avoid the "market effects associated with preparing for and complying with" the underwriting protections as a reason for proposed delay).

[110] *See id.* at 4303 (estimating revenue increases associated with the proposed delay).

[111] 82 Fed. Reg. at 54,835.

[112] *Id.*

[113] *See id.* at 54,485 (regarding lenders' efforts to adjust around restrictions in Ohio state law and the Military Lending Act).

[114] Declaration of J. Patrick O'Shaughnessy in Support of Plaintiffs' Motion for Preliminary Injunction 2-3, *CFSA v. CFPB*, No. 18-cv-295 (W.D. Tex. Sept. 17, 2018), ECF No. 42-3.

[115] Yuka Hayashi, *Florida Gives Payday Lenders a Boost*, Wall Street Journal (Mar. 19, 2018), https://www.wsj.com/articles/florida-gives-payday-lenders-a-boost-1521503621.

and estimates of these losses—and the corresponding ways in which the Delay Proposal could benefit industry—are incomplete.

These omissions are particularly problematic, given the context. When the CFPB issued the 2017 Rule, the agency developed estimates of that rule's negative impact on industry in explaining the costs of measures whose purpose was to *protect consumers*. Here, by contrast, the CFPB is relying on an overstatement of those effects as support for *reducing protections* for consumers in order to achieve benefits for *industry*.

The Delay Proposal's impact analysis also lacks other detail necessary for a meaningful notice-and-comment period. For instance, under the heading "other benefits and costs," the proposal recites a host of unquantified effects using general language and unexplained terms that give the public little indication of what some of the listed effects would be, let alone the importance of the purported impact or the agency's reasoning for associating each impact with the proposed delay.[116] The proposal also devotes inconsistent attention to its costs and benefits. Regarding benefits, it highlights some "*small* but *potentially* quantifiable delay" in increased consumer transportation costs, which the agency asserts will result from the 2017 Rule because some lending storefronts are expected to close.[117] But the Delay Proposal does not correspondingly identify the ways in which a delay can *harm* consumers on the transportation front, by allowing title-lenders to continue lending practices that result in borrowers losing their cars altogether—a consequence that can leave consumers without any way to get to work or school.[118] It simply includes a general reference to the "indirect costs arising from increased repossession," without explanation of what these costs are or their magnitude.[119]

Other aspects of the Delay Proposal similarly omit critical facts and details. The agency's discussion of certain companies' compliance concerns, for example, does not address companies that can ably comply by August 19, 2019. It also uses vague and unexplained terms to describe the compliance concerns it heard. It does not explain the source of any vendor's delay or specify or estimate how many companies face each type of challenge, what portion of the market those challenges could affect, the ability of companies to overcome the challenge, or how much additional time (if any) the complaining companies need to come into compliance.

The proposal's discussion of its impact on consumer borrowers is even more cursory. In explaining why the CFPB seeks delay, the proposal's *sole* mention of consumers is its unexplained assertion that the "industry disruptions" caused by implementation of the underwriting protections "may have negative impacts on consumers, including restricting consumer access to credit."[120] This vague statement is hardly an accurate portrayal of what implementation of the 2017 Rule's underwriting protections will entail: for consumers, the principal effect will be to benefit them by reducing the harm they suffer from lenders' unfair and

[116] *See* 84 Fed. Reg. at 4303-04.

[117] *See id*. at 4303 (emphasis added).

[118] *See generally* 82 Fed. Reg. at 54,839 (discussing the impact of vehicle repossession, one of the consequences of default that the CFPB expects the 2017 Rule's underwriting protections to reduce).

[119] *See* 84 Fed. Reg. at 4304.

[120] *Id*. at 4300.

abusive practice.[121] As noted above in section II.A, the proposal's discussion of the reasons for delay ignore this fact altogether. Though the proposal later recognizes that *delaying* the underwriting protections will harm consumers, it does so only in brief form.[122]

The CFPB also fails to explain related decisions by the agency that could inform commenters' reaction to the Delay Proposal. For instance, the Delay Proposal mentions the pending litigation over the 2017 Rule,[123] but does not inform the public that the CFPB itself asked the court to stay the Rule's compliance date or explain the CFPB's assumptions about the relationship between that litigation and this proposal.

Additionally, the Delay Proposal does not explain its statement that the CFPB considers the OMB number assigned to the 2017 Rule to be "not yet active" because OMB has not approved the PRA request submitted with that Rule.[124] OMB expressly allows agencies to proceed with PRA collections, based on inferred OMB approval, if the OMB director does not act on an agency's submission within 60 days of a final rule being published in the Federal Register.[125] As explained above, that inaction is the course that Mr. Mulvaney chose regarding the 2017 Rule. The Delay Proposal's puzzling reference to the OMB number suggests, however, that the CFPB is pointing to the PRA and OMB's inaction as an alternative justification for delaying key aspects of the Rule—without any public explanation and starting as early as January 16, 2018, when OMB approval was due and section 1041.11 was set to be fully effective. Such an approach would be an inappropriate and unjustified end-run around rulewriting requirements. Moreover, it could affect not only the underwriting protections at issue here, but also the Rule's payment protections, whose compliance date is also August 19, 2019, and which the agency has stated it is *not* seeking to delay.[126] Especially in light of these broad effects on consumers and regulated entities, a clear explanation of the CFPB's approach is critical for commenters to be able to understand and address the agency's proposal.

2. The CFPB did not comply with Regulatory Flexibility Act requirements.

The Delay Proposal also takes shortcuts with rulemaking requirements by misapplying the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996. The CFPB concluded that it did not need to comply with the RFA's rulemaking requirements because the proposed delay would not have a significant economic impact on a substantial number of small entities, and thus fell into an exception to the RFA requirements.[127] But this conclusion is incompatible with the core premises of the Delay Proposal, and is thus insupportable. The RFA analysis recognizes that the proposed delay would benefit small entities but describes that benefit largely as a timing change, while earlier portions of the

[121] *See generally* 82 Fed. Reg. at 54,817, 54,835-39.

[122] 84 Fed. Reg. at 4303-04.

[123] *See id*. at 4298 & n.5, 4300.

[124] *Id*. at 4305.

[125] *See* 5 C.F.R. §§ 1320.5(a)(2), 1320.11(i).

[126] *See* 84 Fed. Reg. at 4301.

[127] *See id.* at 4305.

Delay Proposal estimate that a delay would result in concrete revenue gains for lenders.[128] Further, the RFA analysis asserts that the proposed delay's impact would not be significant because "small entities would retain the option of coming into compliance with [the underwriting protections] on the original August 19, 2019 compliance date."[129] The rest of the Delay Proposal, however, contradicts any suggestion that lenders will be *voluntarily* adopting the underwriting protections in the 2017 Rule. Central to the proposal is the CFPB's concern that "small lenders" are worried about revenue losses and market exit, its assertion that delay is necessary to "allow industry participants to avoid" the "injury" that compliance would entail, and its worry about lenders' challenges in complying.[130] In 2017, the agency recognized that entities could have voluntarily adopted many aspects of the Rule's underwriting protections, but did not do so.[131] The Delay Proposal similarly notes the CFPB's expectation that if it delays the compliance date for these provisions, most lenders will "simply delay" "coming into compliance."[132]

If the Delay Proposal rests on one set of predictions about market circumstances, the CFPB cannot use a conflicting set of market assumptions to minimize the proposal's impact and avoid the procedural requirements of the RFA.[133] If the CFPB does not withdraw its proposal, it must re-propose it in accordance with the RFA.

3. The CFPB's rushed timeline does not allow consideration of relevant comments, including comments on the Rescission Proposal.

The CFPB states that any final rule to delay its underwriting protections will "be published and become effective prior to August 19, 2019," just five months after the comment period ends.[134] The CFPB should not assume, however, that it can finalize a rule on that schedule. The agency must take the time it needs to consider the comments it receives. If the CFPB does not withdraw its proposal, its review of and response to comments should encompass the comments it receives on the Rescission Proposal. These comments are important because the Delay Proposal's analysis of its impact rests on the similar analysis in the Rescission Proposal, which the Delay Proposal references with little explanation or discussion.[135] Further, the Delay Proposal expressly directs

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[128] *Compare id.* at 4305 with *id.* at 4303.

[129] *Id.* at 4305.

[130] *See id.* at 4300.

[131] *See* 82 Fed. Reg. at 54,817.

[132] 84 Fed. Reg. at 4304.

[133] *Cf. Air All.*, 906 F.3d at 1068 (holding that EPA rule delaying an earlier rule does not rationally explain the attempted change in effective date when the agency "attempts to minimize the impact of the Delay Rule" and that assertion "is incompatible with the EPA's statement" that a delay will allow the agency to reconsider the earlier rule without imposing "substantial compliance …burden"); *State v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1066 (N.D. Cal. 2018) (in preliminarily enjoining agency's effort to roll back an earlier rule, noting that the agency "does not explain how or why it could conclude that the calculated costs could be so insignificant as not to unnecessarily or disproportionately burden small entities within the meaning of the RFA, and simultaneously conclude that there would be a disproportionate effect for other purposes").

[134] 84 Fed. Reg. at 4302.

[135] *See, e.g.*, *id.* at 4302 (describing impact as "1.25 years of the annualized, ongoing impacts" of the Rescission Proposal), 4303 (similar).

the public to file comments on the Rescission Proposal's impact analysis on the docket for that proposal, implying that even comments that would be relevant to the Delay Proposal should be submitted there.[136] Moreover, the Delay Proposal repeatedly references the reasons the CFPB has proposed for permanently rescinding the 2017 Rule's underwriting protections.[137] As explained above in section II.A, the fact that the Rescission Proposal is pending does not justify delaying the 2017 Rule's compliance date. If, however, the CFPB seeks to rely on that proposal, it should address commenters' concerns about it.

4. The proposal suggests the CFPB will build a one-sided record.

The CFPB's discussion of industry compliance concerns appears designed to build a one-sided record. For one thing, the Delay Proposal does not evidence effort by the CFPB to build a complete and balanced record about entities' compliance efforts, though the agency has multiple tools for seeking information about lenders' and vendors' progress toward compliance with the 2017 Rule, including supervisory exams that involve assessment of payday lenders' compliance risk management systems.[138] Moreover, while the Delay Proposal asks commenters to provide more information about "the specific challenges" that industry participants face in meeting the August 2019 compliance date, it does not expressly ask commenters to provide contrary information, about companies that are able to meet that deadline.[139]

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For all of these reasons, Public Citizen urges the CFPB to withdraw its Delay Proposal and maintain the August 19, 2019 compliance date for the underwriting protections in the 2017 Rule: vital consumer protections that address the substantial harm caused by unaffordable payday and vehicle title loans.

Thank you for your consideration of these comments.

Sincerely,

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[136] *See id.* at 4303.

[137] *See e.g., id.* at 4300, 4301.

[138] *See CFPB Examination Procedures, Short-Term Small-Dollar Lending* 1 (Sept. 2013), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201309_cfpb_payday_manual_revisions.pdf.

[139] 84 Fed. Reg. at 4301.

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