

FILED

August 28, 2020

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BY: _____
DEPUTY

COMMUNITY FINANCIAL SERVICES
ASSOCIATION OF AMERICA, LTD., and
CONSUMER SERVICE ALLIANCE OF
TEXAS,

Plaintiffs,

v.

CONSUMER FINANCIAL PROTECTION
BUREAU and KATHLEEN LAURA
KRANINGER, in her official capacity as
Director, Consumer Financial Protection
Bureau,

Defendants.

Civil Action No. 1:18-cv-00295

AMENDED COMPLAINT

Plaintiffs Community Financial Services Association of America, Ltd., and Consumer Service Alliance of Texas allege, by and through their attorneys, on knowledge as to Plaintiffs and on information and belief as to all other matters, as follows:

1. Consumer credit products, including small-dollar, short-term loans known as payday loans or payday advances, as well as consumer installment loans, provide a financial lifeline for millions of consumers who need access to funds and choose these products over other available forms of credit. Currently, approximately twelve million Americans per year rely on payday loans to help with their financial needs, and millions more rely on installment lending. Without payday and installment loans, these consumers would be forced into vastly inferior and more costly alternatives, such as pawn loans, defaults on other debts, late-payment fees, and the use of unregulated and illegal underground sources of credit. Consumers understand this, which is why they consistently and overwhelmingly praise these products and value the flexibility they provide.

2. Yet rather than strengthen and protect access to these critical forms of consumer credit, the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) decided to virtually eliminate payday lending through its final rule on payday, vehicle title, and certain high-cost installment loans (the “2017 Rule”). Part of the 2017 Rule consisted of draconian ability-to-repay provisions, also known as underwriting provisions, that restricted payday loans to borrowers with sufficient net income to satisfy all other financial obligations and repay the loan within its initial term—a limitation fundamentally inconsistent with the fact that consumers, many of whose income and expenses vary from one month to the next, use payday loans precisely *because* their net income in a particular month may be insufficient to satisfy their financial obligations. Another part of the Rule, known as the payments provisions, imposed arbitrary, capricious, and unwarranted limitations on consumers’ ability to pre-authorize future payments from their bank accounts for payday and installment loans, thereby increasing the risks of late-payment fees and loan defaults, and potentially limiting access to credit.

3. The 2017 Rule rested on unfounded presumptions of harm and misperceptions about consumer behavior, and was motivated by a deeply paternalistic view that consumers cannot be trusted with the freedom to make their own financial decisions. In fact, the Bureau ignored and attempted to discount the available research showing that the identified practices result in *improved* financial conditions, not harm, because in many cases they are better than the alternative options available to consumers. By targeting a critical form of credit for millions of borrowers who are in dire need of it, the 2017 Rule would have severely injured the very consumers the Bureau is charged with protecting.

4. This fundamentally flawed rule resulted from a fundamentally flawed agency—one whose substantial power over the U.S. economy was unconstitutionally concentrated in a

single, unaccountable and unchecked Director insulated from both the President and the Congress and hence from the people. The Bureau's policies—including the 2017 Rule—were therefore those of the Director alone, without any mechanism of political accountability.

5. Following the resignation of the Director responsible for the 2017 Rule, the Bureau acknowledged certain key flaws in the 2017 Rule, including that the evidence supporting the 2017 Rule was insufficiently robust and reliable and that the prior Director has misinterpreted the proper scope of the Bureau's statutory authority to regulate unfair, deceptive, and abusive acts and practices ("UDAAP"). The Bureau accordingly initiated rulemaking proceedings to revoke the underwriting provisions of the 2017 Rule and, on July 22, 2020, promulgated a final rule revoking those provisions.

6. Even though the payments provisions suffered from similar flaws, including the very same misinterpretation of the Bureau's UDAAP authority, the Bureau arbitrarily and capriciously declined to consider repealing those provisions at that time.

7. On June 29, 2020, while the revocation rulemaking was pending, the United States Supreme Court held that the Bureau's structure was unconstitutional, and invalidated the statutory provision that had insulated the Bureau's director from removal by the President except for cause.

8. Because the Bureau was unconstitutionally structured prior to June 29, 2020, it lacked the authority in 2016 and 2017 to undertake notice-and-comment rulemaking and promulgate the 2017 Rule. So that Rule, including the payments provisions still at issue, was void *ab initio*.

9. In response to the Supreme Court's ruling, the Bureau announced a "ratification" purporting to affirm and ratify the payment provisions of the 2017 Rule. This purported ratification did not go through notice-and-comment rulemaking and failed to explain, or even address, why the

Bureau was purporting to affirm and ratify components of a rule that had relied, in the Bureau's own assessment, on an incorrect interpretation of the Bureau's statutory UDAAP authority.

10. At the same time, the Bureau arbitrarily and capriciously denied a petition from CFSA member Advance Financial to amend the 2017 Rule to exempt debit-card payments from the payments provisions.

11. The Bureau's purported ratification of the payments provisions is legally insufficient to cure the constitutional defects in the 2017 Rule or otherwise make effective the 2017 Rule's payments provisions. Those provisions require a valid rulemaking process, which only a validly constituted agency can undertake. If the Bureau wishes to impose those provisions, it must conduct a new, valid rulemaking. To allow it to lean on ratification now would enable the agency to sidestep essential notice-and-comment requirements based on a previous agency action (an attempted rulemaking) that all now agree had no legal force whatsoever, and that cannot lawfully be given retroactive legal force through a ratification.

12. Even if this sort of ratification workaround were a coherent possibility in the abstract, the Bureau's attempted ratification here was arbitrary and capricious because the "ratified" provisions rested on an interpretation of "unfair" and "abusive" that the Bureau has since repudiated. The attempted ratification also violates principles of agency law that govern all ratifications.

13. Even apart from the flawed ratification, the payments provisions of the 2017 Rule and the rulemaking process that produced them suffer from other critical flaws. For one, the 2017 Rule is fundamentally at odds with Congress's careful delineation of the Bureau's statutory authority. Congress set a clear boundary on the Bureau's powers by unequivocally declaring that the Bureau lacks the authority to establish a usury limit. The payments provisions flagrantly run

afoul of this statutory restriction by improperly targeting installment loans with a rate higher than 36%.

14. The payments provisions also are unlawful because they rest on a construction of the statutory terms “unfair” and “abusive” that, as the Bureau itself concedes, is incorrect and because, in any event, the Bureau lacks substantial evidence for its conclusions that the prohibited payments practices are unfair and abusive. To the contrary, the Bureau simply presumed without evidence that consumers do not know or appreciate what they are doing when they provide authorizations for lenders to initiate payments by accessing their bank accounts.

15. The payments provisions are arbitrary and capricious for the further reasons that they improperly assume lenders are the *cause* of the purported injury. In fact, the alleged harms—the fees charged by the consumers’ banks for failed payment-transfer attempts and the possibility of account closures—are caused by third parties involved in repayment efforts, and it is arbitrary, capricious, and unreasonable for the Bureau to restrict lender practices because of perceived abuses by non-lenders. The Bureau also acted arbitrarily and capriciously in extending the payments provisions to multi-payment installment loans (where consumers have lengthy periods of time between installments to respond to failed payment-transfer attempts) and to debit and prepaid card transactions (for which failed payment-transfer attempts typically do not result in fees).

16. For these and other reasons set forth herein, the 2017 Rule and the Bureau’s purported ratification of the payments provisions are outside the Bureau’s constitutional and statutory authority, as well as unnecessary, arbitrary, capricious, overreaching, procedurally improper, and substantially harmful to lenders and borrowers alike. Accordingly, Plaintiffs ask this Court to set aside the 2017 Rule and the purported ratification under the Constitution and the

Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (the “APA”). In the alternative, because the Bureau’s denial of Advance Financial’s rulemaking petition was arbitrary and capricious, the Court should order the Bureau to undertake the rulemaking requested in Advance Financial’s petition.

PARTIES

17. Plaintiff Community Financial Services Association of America, Ltd. (“CFSA”) is a non-profit organization created in and existing under the laws of Maryland. CFSA is a national trade association for companies offering small-dollar, short-term payday loans and similar consumer financial products, including consumer installment loans. CFSA was established in 1999 to promote laws and regulations that protect consumers while preserving their access to credit options, and to support and encourage responsible industry practices. In bringing this action, CFSA seeks to vindicate the interests of its members, who are engaged in the business of offering payday loans, installment loans, and similar consumer financial products, several of whom have extensive operations in Texas. CFSA’s members are directly regulated and injured by the 2017 Rule, and are adversely affected by the Bureau’s purported ratification of the payments provisions and its denial of Advance Financial’s rulemaking petition. This lawsuit is germane to the purpose of CFSA, which exists to preserve consumers’ access to consumer credit options. CFSA’s individual members are not indispensable to the proper resolution of the case.

18. Plaintiff Consumer Service Alliance of Texas (“CSAT”) is a non-profit organization created in and existing under the laws of Texas. It is headquartered and maintains its principal place of business in Austin, Texas. CSAT is a statewide trade association whose members are regulated, licensed Texas credit access businesses (“CABs”) that obtain for consumers or assist consumers in obtaining extensions of consumer credit in the form of single-

payment and multiple-payment small-dollar, short-term deferred presentment transactions (*i.e.*, payday loans), and motor vehicle title loans. CSAT advocates for the protection of financial choice based on personal responsibility and seeks to help ensure that Texans have access to short-term loans and other financial-services products in compliance with the law and responsible industry practices. In bringing this action, CSAT seeks to vindicate the interests of its members, who are engaged in the business of obtaining for consumers or assisting consumers in obtaining single- and multiple-payment payday and motor vehicle title loans, and who are thus directly regulated and injured by the 2017 Rule and are adversely affected by the Bureau's purported ratification of the payments provisions and its denial of Advance Financial's rulemaking petition. This lawsuit is germane to the purpose of CSAT, which exists to preserve consumers' access to consumer credit options. CSAT's individual members are not indispensable to the proper resolution of this case.

19. Defendant Consumer Financial Protection Bureau ("CFPB" or the "Bureau") is an executive agency of the United States within the meaning of 5 U.S.C. § 105 and an agency within the meaning of the APA.

20. Defendant Kathleen Laura Kraninger is the Director of the Consumer Financial Protection Bureau. She is sued in her official capacity.

JURISDICTION AND VENUE

21. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 702 (waiver of sovereign immunity).

22. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(A), because Defendants are an agency and an officer of the United States and plaintiff CSAT resides in this judicial district. Venue is also proper in this Court under 28 U.S.C. § 1391(e)(1)(B), because

Defendants are an agency and an officer of the United States and a substantial part of the events or omissions giving rise to the claims occurred in this District.

STATEMENT OF FACTS

A. The Consumer Financial Protection Bureau

23. In 2010, in response to the 2008 financial crisis, Congress enacted and President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. No. 111-203 (“Dodd-Frank Act”). Title X of the Dodd-Frank Act is the Consumer Financial Protection Act of 2010 (“CFPA” or “Act”).

24. The Act’s centerpiece was the establishment, “in the Federal Reserve System,” of a new “independent” regulatory agency known as the Bureau of Consumer Financial Protection (“CFPB” or “Bureau”). The Bureau is charged with regulating individuals and entities that engage in offering or providing consumer financial products or services, including loans provided primarily for personal, family, or household purposes.

25. As originally proposed by then-Professor Elizabeth Warren, the Bureau was to operate as a traditional multi-member independent agency. In the final legislation, however, Congress strayed from this well-established structure and instead provided, in Section 1011(b) of the Act, for a single “Director,” appointed by the President with the advice and consent of the Senate, to “serve as the head of the Bureau.” The Act provides that the Director shall serve for a term of five years.

26. Before it was invalidated by the Supreme Court, a provision of Section 1011(c) of the Act provided that the President may remove the Director only for cause, that is, “for inefficiency, neglect of duty, or malfeasance in office.” As a result, the President lacked the power to supervise or direct the Director in the exercise of his statutory authorities.

27. The Act delegates to the Bureau broad authority to create and enforce U.S. consumer protection laws. The Bureau possesses the power to “prescribe rules or issue orders or guidelines pursuant to” nineteen distinct consumer protection laws whose implementation was transferred to the Bureau from seven different government agencies. *See* CFPA § 1061(a), 12 U.S.C. § 5581(a). The Bureau may pursue actions to enforce these consumer financial laws and its own regulations in federal court, as well as in administrative actions before administrative law judges, and may issue subpoenas requesting documents or testimony in connection with those enforcement actions. CFPA §§ 1052–1054, 12 U.S.C. §§ 5562–5564. The Bureau has the power to impose a wide range of legal and equitable relief, including restitution, disgorgement, money damages, injunctions, and civil monetary penalties. *Id.* The Bureau also has supervisory power over nondepository lenders, including those who offer or provide payday and installment loans. *Id.* § 1024, 12 U.S.C. § 5514.

28. Section 1021(a) of the Act requires the Bureau to implement and enforce consumer financial law “consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products,” and instructs the Bureau to ensure that “consumers are provided with timely and understandable information to make” their own “responsible decisions about financial transactions.”

29. Section 1022(a) of the Act provides that, in exercising its rulemaking authority, the Bureau must consider “the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule” and “the impact of proposed rules on covered persons ... and the impact on consumers in rural areas.”

30. Section 1031(b) of the Act provides that the Bureau’s rulemaking authority includes the power to “prescribe rules ... identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.” Section 1031(h) further provides that “[r]ules under this section may include requirements for the purpose of preventing such acts or practices.” This power to regulate unfair, deceptive, and abusive acts and practices is often referred to as the Bureau’s “UDAAP” authority.

31. Pursuant to section 1031(c) of the Act, “[t]he Bureau shall have no authority ... to declare an act or practice ... to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that—(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.” Moreover, while “the Bureau may consider established public policies as evidence to be considered with all other evidence” in determining whether an act or practice is unfair, “[s]uch public policy considerations may not serve as a primary basis for such determination.”

32. Pursuant to section 1031(d) of the Act, “[t]he Bureau shall have no authority ... to declare an act or practice abusive ... unless the act or practice—(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of—(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.”

33. Section 1027(o) of the Act provides that the Bureau lacks the authority to impose any usury limits on the extension of credit. It states: “No provision of this title shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law.”

B. The Market for Payday and Installment Loans

34. A payday loan is small-dollar, short-term, unsecured loan based on a consumer’s employment or other income. While the concept of an individual getting a loan based on future income has been around for centuries, payday lending emerged in the 1990s as check-cashing businesses began offering the service of cashing post-dated checks or agreeing to defer presentment of cashed checks. Today, thirty-five States permit—and regulate—payday lending.

35. The modern payday-lending transaction is straightforward. A borrower presents a lender evidence of a bank account and employment or other income. The borrower writes a check for a set amount or authorizes an equivalent electronic withdrawal from his bank account, and receives a cash loan of some value less than the face value of the check or electronic-withdrawal authorization. The payday lender promises not to cash the check or make the withdrawal for a short period of time, typically two weeks or a month. After that time, the borrower may pay off the loan in cash or the lender may cash the check or make the withdrawal. The difference between the face value of the check or authorized withdrawal and the cash received by the consumer represents the fee. The typical payday transaction involves a loan of a few hundred dollars with a fee of \$15 per \$100 borrowed. This charge reflects the cost and risks of extending this form of credit.

36. At the end of the loan’s term, a borrower may also have the option (depending on state law) of renewing, reborrowing, or rolling over the loan for another term for an additional

charge. The borrower typically pays the original fee at this time. The Bureau refers to two or more payday loans taken in this manner as constituting a payday-loan “sequence.”

37. Another form of small-dollar consumer credit is the installment loan. These loans typically involve a larger principal balance than payday loans, and are repaid in multiple installments over a longer period of time, which each installment typically due at the consumer’s payday. Like traditional payday loans, the borrower typically provides the lender with authorization to obtain repayment by withdrawing the funds from the borrower’s bank account.

38. As in other contexts (*e.g.*, automatic bill payment), the use of preauthorized payments provides numerous benefits to consumers, including convenience, fewer missed payments, and lower costs.

39. Lenders offering payday and installment transactions provide a valued service to underserved consumers. Due to low profitability, mainstream financial institutions have largely vacated the small-dollar, short-term credit market, except for credit cards. Yet credit cards are unavailable to a significant subset of the population, and those who do have credit cards may have no remaining unused credit line. Left without access to commercial-bank credit, consumers with small, short-term credit needs must search for alternatives. Those alternatives include, for example, tapping into savings (if any), borrowing from social networks, pawn loans, and incurring fees associated with existing accounts, such as late-payment fees. Each of these types of credit has obvious drawbacks and consumers often do not have access to some types. Many consumers, for example, lack savings to tap or do not enjoy social networks populated by people with liquid assets to lend. Payday lending and installment lending, by contrast, offer access to credit for consumers whose only resource is employment or other income, and they offer it on clear terms at nearby locations during convenient hours and on a quick timetable. Indeed,

payday lending and installment lending are not only available and attractive options for underserved consumers, they are often the most cost-effective options.

40. By providing a source of credit to consumers with low credit scores and no viable alternatives, payday and installment loans expand financial choices and allow individuals and households to better manage their cash flow in the face of volatile income and expenses. This in turn enables these consumers to avoid more costly alternatives, such as pawnbrokers, credit-card cash advances, over-the-limit credit-card fees, late-payment fees, utility-reconnection fees, and the like. Thus, restricting payday and installment lending as options for financially stressed consumers will make them worse off and force them to use inferior and less-preferred types of credit, such as pawn shops, or to go without credit.

41. Numerous studies demonstrate that consumers will substitute inferior and more costly alternative forms of credit when they lack access to payday loans. In States that have banned payday loans, the reduction in payday borrowing leads to increases in pawn loans. Consumers subject to payday-loan bans also bounce more checks and pay more bank overdraft fees. When Georgia and North Carolina banned payday lending, for example, the number of bounced checks skyrocketed. According to a Federal Reserve Board study, the number of consumer bankruptcies also increased.

42. These alternative forms of credit are both more expensive and have equivalent or higher annual percentage rates (“APRs”) than payday and installment loans. Pawn loans in many states, for example, have an average fee of \$20 for each \$100 borrowed, which translates to an APR of about 250 percent. And pawn shops are especially unappealing to many consumers because, even if their cost is comparable to payday loans, they require the borrower to part with valuable personal property that is forfeited upon default.

43. The same is true of revolving credit and credit-card cash advances: consumers forced to engage in greater use of revolving credit likely end up paying even higher costs for credit and run into greater financial difficulty. For revolving credit, financially stressed consumers frequently find themselves pushed toward credit-line maximization and difficulty in meeting payments. And for credit-card cash advances, consumers fare even worse, showing a much higher rate of missed payments on mainstream credit loans than those who use payday loans.

44. Restricting access to payday and installment loans hurts consumers in other ways as well. Without access to such loans, consumers are forced to miss required payments or to default on their other debts, giving rise to various collateral consequences, including late fees on utility bills or termination of crucial utility services, loss of bank accounts, and loss of a vehicle due to missed car payments or inability to pay for repairs. Further, unlike payday-loan defaults, which typically are not reported to the national credit bureaus, missed payments on other loans and invoices can damage the consumer's formal credit standing, making it even more difficult for the consumer to obtain credit and substantially harming his or her long-term financial health.

45. Finally, consumers lacking access to payday and installment loans may turn to underground sources of credit, including illegal, unregulated lenders and criminal loan sharking, with its associated threats of violence. Research in the United States confirms that where payday credit has been restricted, consumers turn to online and unlicensed lenders. Similarly, research on foreign countries has shown that when access to consumer credit is restricted, many consumers will turn to illegal lending markets. Not surprisingly, borrowing from illegal lenders comes at a much higher cost than a payday loan, and collections by illegal lenders rest on threats, intimidation, violence, and forms of exploitation, including demands for sexual favors.

46. It is unsurprising, therefore, that payday borrowers praise the product and the companies who offer it in overwhelming numbers. The Bureau's own "Tell Your Story" and consumer-complaint portals demonstrate the overwhelmingly positive reaction of borrowers. Nearly all of the stories submitted to the "Tell Your Story" portal on payday lending and similar products are positive. The Bureau receives a minuscule number of complaints related to regulated, storefront payday lenders, far fewer than complaints about other products and services monitored by the Bureau. Social-science studies showing widespread borrower satisfaction confirm that an overwhelming number of borrowers are satisfied with the product.

47. A substantial amount of evidence confirms that access to payday loans does not harm consumers, but rather improves consumer financial health. These studies demonstrate that restricting access to payday loans injures consumers in various ways, including by causing troubles with debt-collection agencies, delinquency on other accounts, mortgage foreclosures, bankruptcies, late payment of bills, and unemployment. They likewise show that consumer access to payday loans has no negative effect on various measures of consumer financial health.

48. Empirical research also shows that payday borrowers understand the nature of the product, including that their payday-loan indebtedness may last longer than the two-week or thirty-day initial term of the loan, and accurately predict how long it will take to repay their loans. Consumers thus fully understand and act in their own interests.

49. Under Texas law, consumers obtain payday, title, and similar small-dollar, short-term loans via regulated, licensed credit access businesses ("CABs") that obtain or assist consumers in obtaining loans made by independent third-party lenders. The CABs, rather than the lenders, maintain storefront locations, assist in qualifying borrowers, typically service and collect the loans for the lenders, and may also guaranty the loans. *See* 82 Fed. Reg. 54,472,

54,486, n.140 (Nov. 17, 2017). Consumers pay a fee to the CAB and interest on the loan capped at 10% per annum. According to the Bureau, the loans produced by such arrangements are functionally the same as those issued by a single entity. *Id.* at 54,534–35.

C. The Rulemaking Process

50. Despite the popularity and benefits of payday and installment loans, the Bureau upon its formation promptly targeted them for elimination because of their high interest rates.

51. In developing and promulgating the 2017 Rule, the Bureau acted with an unalterably closed mind toward the preordained result of shutting down the payday-lending industry.

52. In targeting payday loans, the Bureau took its marching orders from special-interest groups opposed to payday lending, including Pew Charitable Trusts (“Pew”) and the Center for Responsible Lending (“CRL”). *See, e.g.,* Anna Palmer, *Emails reveal consumer protection agency’s cozy ties*, Politico, Nov. 19, 2015, *available at* goo.gl/DRCiTV. Among other things, the Bureau’s proposed rule followed a literal outline given to it by CRL, and the Bureau later acceded when CRL directed it to speed up issuance of a final rule by abandoning certain provisions addressing longer-term installment lending. At the same time, the Bureau cast aside independent studies submitted by payday lenders and neutral third parties—a strong indication, in itself, that the agency’s preferred conclusions are not supported by evidence.

53. On June 2, 2016, the Bureau published a notice of proposed rulemaking that proposed to impose ability-to-repay (or underwriting) requirements and payments requirements on the extension of payday loans, vehicle-title loans (*i.e.*, loans secured by an interest in a vehicle), and installment loans with an APR higher than 36%. *See* 81 Fed. Reg. 47,863 (July 22, 2016). Although the Bureau accepted comments on the proposed rule during a four-month window ending in October 2016, the result of the rulemaking was a foregone conclusion: the

elimination of longstanding payday (and vehicle-title) lending practices relied on by millions of customers, based on the Bureau's ideological and highly paternalistic view that these products are too expensive and that customers cannot be trusted with the freedom to make their own financial decisions.

54. Despite receiving substantial criticisms of the proposed rule from various constituents, as well as more than 1.4 million comments overall, the Bureau rushed the proposed rule to completion less than one year after the close of the 2016 comment period. The 2017 Rule was published in the Federal Register on November 17, 2017. *See* 82 Fed. Reg. 54,472 (Nov. 17, 2017).

D. The Provisions of the 2017 Rule

55. One of two principal elements of the 2017 Rule was the imposition of an ability-to-pay (or underwriting) requirement applicable to consumer loans, including payday and vehicle-title loans, with a contractual duration of forty-five days or less. Under that requirement, a lender could not extend a covered short-term loan unless it made a "reasonable determination" that the consumer can make payments for major financial obligations (housing expense, debt obligations, including those under other covered loans, child-support obligations, and alimony), make all payments under the loan (*i.e.*, principal, interest, and fees), and meet basic living expenses (*e.g.*, food, utilities, transportation to work, daycare for dependent children), during the term of the loan and for thirty days thereafter.

56. The underwriting provisions have since been revoked by the Bureau and therefore are not currently at issue in this lawsuit. *See* 85 Fed. Reg. 44,382 (July 22, 2020). In accordance with the Court's instruction to omit unnecessary material from this Amended Complaint, Plaintiffs are not including herein allegations directed at the underwriting provisions. Plaintiffs reserve the right to renew their constitutional, statutory, and administrative-law

challenges to the underwriting provisions, as set forth in Plaintiffs' original complaint in this action, in the event the Bureau's revocation of those provisions is set aside as a result of legislative, executive, administrative, or judicial action, or otherwise.

57. In addition to imposing the since-revoked underwriting requirement, the 2017 Rule also prohibited, as an "unfair" and "abusive" practice, lenders of certain loans (including payday loans, vehicle-title loans, and installment loans with an APR greater than 36%) from attempting to withdraw pre-authorized payments from a consumer's account after the lender's second consecutive attempt to do so has failed due to a lack of sufficient funds, without obtaining a new, specific authorization for further withdrawals from the consumer. 12 C.F.R. §§ 1041.7–8. This prohibition applies to payments made by debit card and prepaid card, even though card payments typically do not result in bank nonsufficient funds (NSF) fees. And the prohibition applies to the subsequent pre-authorized payments of a multi-payment installment loan, even though there typically is ample time between installments for a consumer to ensure that sufficient funds are deposited into his account or to contact the lender to obtain an extension or arrange other payment options.

58. In order to obtain a new, specific authorization for further withdrawals from the consumer, a lender must first provide the consumer with a required consumer rights notice within three business days of the second consecutive failed attempt. *Id.* §§ 1041.8(c)(3), 1041.9(c). The 2017 Rule imposes limitations on the lender's ability to obtain the new, specific authorization electronically or by telephone communication. *Id.* § 1041.8(c)(3).

59. The payments provisions of the 2017 Rule also require lenders to provide each consumer with a payment notice prior to initiating the first payment withdrawal or an unusual withdrawal from a consumer's account. *Id.* § 1041.9(b).

60. If allowed to go into effect, the payments provisions of the 2017 Rule will cause substantial harm to consumers by eliminating the convenience of pre-authorized payments and increasing the likelihood that a loan will enter into collections sooner than it otherwise would have (if at all). Some lenders may stop offering installment loans altogether, resulting in higher credits costs and fewer credit options. Due to the Rule's requirement that payment notices and unusual withdrawal notices be provided at least six business days prior to the first payment transfer and the unusual withdrawal, some consumers will face additional loan costs because of the inability to schedule earlier payments. And because the payments provisions will increase the cost to lenders of failed payment attempts, some lenders who have traditionally waived or not charged nonsufficient funds (NSF) or late fees as a customer convenience, will need to begin assessing such fees.

61. The payments provisions, if permitted to go into effect, will also cause substantial harm to lenders. The provisions will make it significantly more likely that loans will be sent to collections or written off and will impose substantial administrative, recordkeeping, and compliance costs. As a result, some lenders may stop offering installment loans altogether.

E. Events Following Promulgation of the 2017 Rule

62. Following the resignation of the Director responsible for the 2017 Rule, the Bureau, led by an Acting Director removable at will by the President, announced that it would engage in notice-and-comment rulemaking to reconsider the 2017 Rule.

63. On April 9, 2018, Plaintiffs filed the instant lawsuit, challenging the constitutionality and lawfulness of the 2017 Rule. The parties agreed to ask the Court to stay both the litigation and the compliance date of the 2017 Rule pending the Bureau's anticipated rulemaking process.

64. The 2017 Rule had been promulgated with a compliance date of August 19, 2019, reflecting a twenty-one-month implementation period that was six months longer than originally proposed. *See* 82 Fed. Reg. at 54,472. The Bureau had reasoned that “the interest of enacting protections for consumers as soon as possible” had to be balanced against “giving [lenders] enough time for an orderly implementation period,” and concluded that twenty-one months were needed for “lenders [to] be able to reasonably adjust their practices to come into compliance with the rule.” *Id.* at 54,814. With respect to the compliance date, the Bureau drew no distinction between the ability-to-repay provisions and the payments provisions. *See id.* at 54,472 (setting same compliance date for both).

65. With 445 days remaining before the 2017 Rule’s August 19, 2019, compliance date, the parties jointly moved in this lawsuit to stay the compliance date. The Bureau joined Plaintiffs in telling this Court that, “to ensure that Plaintiffs’ members ... have sufficient time to prepare their operations for compliance with the Payday Rule in the event Plaintiffs’ claims are unsuccessful,” any stay should “preserve the amount of time for bringing their operations into compliance that Plaintiffs’ members currently have from the date of this motion to the Payday Rule’s current compliance date of August 19, 2019,” *i.e.*, “445 days.” Joint Mot. at 5, ECF No. 16

66. The Court stayed the compliance date on November 6, 2018. At that time, Plaintiffs’ members still had 286 days left until the compliance date.

67. Plaintiffs’ members in good faith have reasonably relied, and continue to rely, on this stay during the pendency of this litigation.

68. On December 13, 2018, CFSA member Advance Financial submitted a petition requesting that the Bureau undertake a rulemaking to amend the payments provisions of the 2017

Rule to exclude debit-card transactions on the ground, among others, that denied debit-card payments rarely (if ever) result in consumers being charged insufficient funds fees, and therefore do not present the risk of consumer harm that the Bureau relied upon as the basis for the payment provisions.

69. In early 2019, the Bureau initiated rulemaking proceedings to revoke the underwriting provisions of the 2017 Rule. *See* Notice of Proposed Rulemaking, 84 Fed. Reg. 4252 (Feb. 14, 2019). In doing so, the Bureau acknowledged certain key flaws in the 2017 Rule, including that the evidence supporting the 2017 Rule was insufficiently robust and reliable and that the prior Director has misinterpreted the proper scope of the Bureau’s UDAAP authority to regulate unfair, deceptive, and abusive acts and practices. *Id.*

70. Numerous commenters, including CFSA, urged the Bureau to revoke the payments provisions as well, pointing out that they suffered from similar legal flaws as the underwriting provisions, including the very same misinterpretation of the Bureau’s UDAAP authority that formed one basis for the Bureau’s revocation of the underwriting provisions.

71. While the 2017 Rule was stayed, the U.S. Supreme Court vindicated Plaintiffs’ position in this lawsuit by holding that the Bureau had been unconstitutionally structured. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). The Court invalidated the statutory provision that had insulated the Bureau’s director from removal by the President except for cause. *Id.*

72. As a result of the Supreme Court’s decision in *Seila Law*, the 2017 Rule was void *ab initio*.

73. Following the Supreme Court’s decision in *Seila Law*, the Bureau promulgated a final rule revoking the underwriting provisions of the 2017 Rule. *See* 85 Fed. Reg. 44,382 (July 22, 2020) (the “Revocation Rule”).

74. Among other things, the Revocation Rule disavowed the legal standard used in the 2017 Rule for assessing unfairness and abusiveness under section 1031(c) & (d) of the Act and adopted what the Bureau determined was a better interpretation of the relevant statutory language.

75. At the same time, the Bureau—now led by a Director removable by the President—published in the Federal Register a “ratification” stating that “[t]he Bureau, through its Director, hereby affirms and ratifies the payments provisions of the 2017 Final Rule.” 85 Fed. Reg. 41,905 (July 13, 2020) (the “Ratification”).

76. The Bureau’s ratification did not address the revised legal interpretation of the Bureau’s UDAAP authority that was described in the Revocation Rule and constituted one basis for revoking the 2017 Rule’s underwriting provisions. Nor did the ratification address whether the evidence before the Bureau during the rulemaking for the 2017 Rule was sufficiently robust and reliable to support the payments provisions.

77. In fact, the stated rationale for the payments provisions in the preamble to the 2017 Rule is inconsistent in numerous respects with the Bureau’s current interpretation of its UDAAP authority. For example, the payments provisions are premised on the Bureau’s contention that a consumer’s decision “not to participate in the market is not considered to be a valid means of reasonably avoiding the [alleged] injury.” 82 Fed. Reg. at 54,737. The Revocation Rule, in contrast, expressly rejects this interpretation of the “not reasonably avoidable” prong of the “unfairness” inquiry, explaining that “[i]t is well-established that consumers can reasonably avoid injury through ... ‘anticipatory avoidance,’” such as “declin[ing] a product or service,” at least where, as here, consumers “in the market for covered loans do not face a take-it-or-leave-it choice,” but rather “can potentially access formal credit

options with varied terms and conditions and other informal credit options, such as borrowing from family and friends.” 85 Fed. Reg. at 44,397.

78. Similarly, the stated rationale for the payments provisions in the preamble to the 2017 Rule recognized that consumers “understand as a general matter that they may incur” fees for failed payment-transfer attempts, but reasoned that “such a generalized understanding does not suffice.” 82 Fed. Reg. at 54,740; *see also id.* at 54,741 (“The Bureau does not rest its legal conclusion on the premise that borrowers are unaware that when they take out covered loans with leveraged payment mechanisms, a payment will be deducted on the due date” and if “the account lacks the funds to cover the payment, they are likely to incur a fee.”). Rather, the Bureau reasoned, “consumers are unaware of the severity of the risk they are exposing themselves to in the circumstances” and “underestimate the extent of the fees.” *Id.* at 54,741. The Revocation Rule, in contrast, expressly rejects this understanding of the “lack of understanding” prong of the “abusiveness” inquiry, explaining that consumers need not “understand their particularized risk,” but need only have an understanding of risks “sufficient to take steps to avoid or mitigate harm from those risks.” 85 Fed. Reg. at 44,394 (discussing “not reasonably avoidable” standard); *id.* at 44,422 (explaining that “lack of understanding” “should be treated as similar to the requisite level of understanding for reasonable avoidability”).

79. The stated rationale for the payments provisions in the preamble to the 2017 Rule also rejected as legally insufficient the argument that consumers have the ability to protect their interests “by not taking out loans in the first place.” 82 Fed. Reg. at 54,743. The Revocation Rule, in contrast, makes clear that consumers’ “access to alternative sources of credit” precludes a finding that consumers are unable to protect their interests. 85 Fed. Reg. at 44,424; *see also id.*

at 44,425 (“if the consumers can protect their interests before they take out the first loan ..., they do not lack the ability to protect their own interests”).

80. On information and belief, the Bureau ratified the payments provisions without considering whether those provisions were supportable under the revised legal interpretation of the Bureau’s UDAAP authority described in the Revocation Rule.

81. On information and belief, the Bureau ratified the payments provisions without considering whether the evidence before the Bureau during the rulemaking for the 2017 Rule was sufficiently robust and reliable to support those provisions.

82. The Bureau’s ratification did not contain a revised cost-benefit analysis under Section 1022(b)(2) of the Act, even though the cost-benefit analysis of the payments provisions contained in the preamble to the 2017 Rule relied on the reduced impact on lender costs caused by the now-revoked underwriting provisions. *See* 82 Fed. Reg. at 54,846 (“the ability-to-repay provisions” will “lessen the impacts of the limitation on payment withdrawal attempts and the number of instances where a lender is required to notify consumers”). Because the underwriting provisions have been revoked, the prior cost-benefit analysis is no longer valid: By the Bureau’s own admission, without the underwriting provisions, the payments provisions will impose higher costs on lenders than the Bureau took into account in 2017. Thus, the prior cost-benefit analysis cannot support the payments provisions, and no other cost-benefit analysis has been done.

83. On information and belief, the Bureau ratified the payments provisions without conducting a revised cost-benefit analysis.

84. The Bureau’s ratification did not contain a compliance date or address the length of the implementation period needed for lenders to be able to reasonably adjust their practices to come into compliance with the rule. Nor did the Bureau’s ratification contain any discussion of

lenders' reasonable reliance on the stay of the compliance date for the payments provisions that had been entered by the Court in this litigation.

85. On information and belief, the Bureau ratified the payments provisions without considering whether lenders have enough time for an orderly implementation period.

86. On information and belief, the Bureau ratified the payments provisions without considering the amount of time needed for lenders to be able to reasonably adjust their practices to come into compliance with the payments provisions.

87. On information and belief, the Bureau ratified the payments provisions without considering the reliance interests of lenders that had reasonably relied on (i) the stay of the compliance date entered in this litigation and (ii) their correct assessment that the Bureau in 2016 and 2017 lacked the constitutional authority to promulgate the 2017 Rule.

88. On July 7, 2020, the Bureau denied Advance Financial's rulemaking petition.

89. On information and belief, the Bureau denied Advance Financial's rulemaking petition without considering whether application of the payments provisions to debit-card transactions was warranted under the revised legal interpretation of the Bureau's UDAAP authority described in the Revocation Rule.

COUNT ONE

THE 2017 RULE IS VOID BECAUSE THE BUREAU THAT PROMULGATED IT VIOLATED THE SEPARATION OF POWERS

90. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

91. Actions taken by an officer or agency that violate the Constitution's separation-of-powers protections are invalid. *Ryder v. United States*, 515 U.S. 177, 182–83 (1995). Private plaintiffs have the right to equitable relief to restrain government action that violates separation-

of-powers principles. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010).

92. In addition, the APA forbids agency action “contrary to constitutional right, power, privilege, or immunity.” 5 U.S.C. § 706(2)(B).

93. The Constitution provides that “[t]he executive Power shall be vested in a President,” U.S. Const., art. II, § 1, and that “he shall take Care that the Laws be faithfully executed,” U.S. Const., art. II, § 2. These provisions vest all executive power, including the power to enforce the law, in the President of the United States. It is unconstitutional for Congress to vest executive power in officers who are not removable by, and hence not accountable to, the President. *See, e.g., Myers v. United States*, 272 U.S. 52, 119 (1926). The sole exception to this rule applies only in the case of certain independent commissions headed by bipartisan, multimember bodies (such as the Federal Trade Commission). *See Humphrey’s Executor v. United States*, 295 U.S. 602, 632 (1935).

94. When the 2017 Rule was promulgated, the Bureau exercised all its powers through a single presidentially appointed Director—not a bipartisan multimember commission—who could only be removed by the President “for cause,” that is “for inefficiency, neglect of duty, or malfeasance in office.” As the Supreme Court has now confirmed, this structure violated the separations of powers under the Constitution. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020).

95. An invalid agency cannot promulgate valid legislative rules. It cannot participate in the notice-and-comment rulemaking process because it lacks the authority to do so. The notice-and-comment process is the way rules are validly created. And if the process was done improperly—for example, if it was done by an invalid agency—then the resulting rule must also

be improper. *See Lucia v. SEC*, 137 S. Ct. 2044, 2054 (2018) (“the ‘appropriate’ remedy for an adjudication tainted with an appointments violation is a new ‘hearing before a properly appointed’ official”) (quoting *Ryder v. United States*, 515 U.S. 177 (1995)). Accordingly, the 2017 Rule was void *ab initio*.

96. The Bureau’s notice of ratification, promulgated without notice-and-comment rulemaking, did not and could not cure this constitutional defect. Even if the Bureau were permitted to “rubberstamp” an *enforcement* action without engaging in fresh deliberations, it cannot issue a *legislative rule* without engaging in the required rulemaking procedures.

97. The Bureau’s attempted ratification violates the Constitution, because it purports to give retroactive legal force to the promulgation of a legislative rule by an invalid agency.

98. Moreover, the Bureau’s attempted ratification in this case was arbitrary and capricious, procedurally improper, and contrary to established principles of agency law.

99. For these reasons, the 2017 Rule is unconstitutional and must be set aside.

COUNT TWO:

THE RATIFICATION IS UNCONSTITUTIONAL, PROCEDURALLY IMPROPER, AND ARBITRARY AND CAPRICIOUS

100. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

101. The APA forbids agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

102. The APA also forbids agency action that is “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

103. The attempted ratification violates the Constitution, because it purports to give retroactive legal force to the promulgation of a legislative rule by an invalid agency.

104. The attempted ratification of the 2017 Rule was procedurally improper because the Bureau was required, but failed, to use notice-and-comment rulemaking to ratify the 2017 Rule.

105. The attempted ratification of the 2017 Rule was also procedurally improper because, for the ratification to be valid, the Bureau was required, but failed, to ratify the payments provisions in full, including with their original implementation period.

106. The attempted ratification of the 2017 Rule was arbitrary and capricious because it relied on a test for “identifying unlawful, unfair, deceptive, or abusive acts or practices,” that the Bureau had disavowed. Specifically, the ratification embraced the 2017 Rule’s payments provisions, in utterly conclusory terms, even though they rested on the very same UDAAP standard that the Bureau had just rejected in revoking the underwriting provisions.

107. The attempted ratification of the payments provisions was also arbitrary and capricious because it reflected an about-face about another essential matter: the time needed to implement the payments provisions. Whereas the 2017 Rule gave companies twenty-one months to implement the payments provisions before compliance would be required—and even though much of that implementation period remained when the compliance date was stayed by order of the Court—the Ratification does not contain any compliance date or implementation period.

108. This alteration of the length of the implementation period rendered the attempted ratification procedurally improper. Even if the Bureau were permitted to ratify the *same* regulatory action, it cannot *amend* that prior action without engaging in fresh deliberations.

109. The attempted ratification of the payments provisions was also arbitrary and capricious because the Bureau failed to consider numerous relevant factors, including whether those provisions are supportable under the revised legal interpretation of the Bureau’s UDAAP

authority described in the Revocation Rule; whether the evidence before the Bureau during the rulemaking for the 2017 Rule was sufficiently robust and reliable to support the payments provisions; whether lenders had enough time for an orderly implementation period; the amount of time needed for lenders to be able to reasonably adjust their practices to come into compliance with the payments provisions; and the reliance interests of lenders that had reasonably relied on both (i) the stay of the compliance date entered in this litigation and (ii) their correct assessment that the Bureau in 2016 and 2017 lacked the constitutional authority to promulgate the 2017 Rule.

110. The attempted ratification was also arbitrary and capricious and not in accordance with law because the Bureau failed to conduct the cost-benefit analysis required by Section 1022(b)(2) of the Act. The Bureau could not rely on the cost-benefit analysis of the payments provisions contained in the preamble to the 2017 Rule because that analysis rested in significant part on the Bureau's conclusion that the costs imposed by the payments provisions on lenders were mitigated by the now-revoked underwriting provisions.

111. The attempted ratification was also arbitrary and capricious because the underlying payments provisions are invalid under the Administrative Procedure Act.

COUNT THREE:

THE 2017 RULE VIOLATES THE NONDELEGATION DOCTRINE

112. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

113. The Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” U.S. Const., art. I, § 1. This provision vests all legislative power in the Congress of the United States.

114. By virtue of its grant of legislative authority to the Bureau under the Act's provisions for prescribing rules identifying as unlawful unfair, deceptive, or abusive acts or

practices, and its lack of an intelligible principle to which the Bureau is directed to conform in the exercise of that authority, the CFPA unconstitutionally delegates legislative power to an administrative agency.

115. For this reason, the 2017 Rule, and any current effort to enforce it, unconstitutionally regulates plaintiffs and must therefore be invalidated and enjoined. In addition, the Final Rule is contrary to constitutional right, power, privilege, or immunity, and must therefore be set aside.

COUNT FOUR:

THE BUREAU VIOLATES THE SEPARATION OF POWERS AND THE RULE THEREFORE IS UNCONSTITUTIONAL AGENCY ACTION

116. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint

117. The Constitution provides that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const., art. I, § 9, cl. 7.

118. The Bureau takes federal government money without an appropriations act: The director has exclusive authority to set the Bureau’s budget at up to 12% of the Federal Reserve System’s operating expenses (over half a billion dollars), *see* CFPA § 1017(a)(2)(A), 12 U.S.C. § 5497(a)(2)(A), a perpetual budget that is exempt even from mere “review by the Committees on Appropriations of the House of Representatives and the Senate,” *id.* § 1017(a)(1)–(2), 12 U.S.C. § 5497(a)(1)–(2). This improper insulation from congressional supervision renders invalid any assertion of the Bureau’s regulatory authority.

119. For this reason, the 2017 Rule, and any current effort to enforce it, unconstitutionally regulates plaintiffs and must therefore be invalidated and enjoined. In addition, the 2017 Rule is contrary to constitutional right, power, privilege, or immunity, and must therefore be set aside.

COUNT FIVE:

**THE PAYMENTS PROVISIONS OF THE 2017 RULE EXCEED
THE BUREAU'S STATUTORY AUTHORITY**

120. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

121. The APA forbids agency action that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C).

122. The 2017 Rule exceeds the Bureau's statutory authority in numerous respects.

123. *First*, the 2017 Rule's identification of unfair and abusive lending practices conflicts with the express limitations on the Bureau's authority to declare an act or practice unfair or abusive as set forth in section 1031 of the CFPA, 12 U.S.C. § 5531.

a. In order to be classified as “unfair,” a practice must be “likely to cause substantial injury” that is “not reasonably avoidable by consumers.” CFPA § 1031(c)(1)(A), 12 U.S.C. § 5531(c)(1)(A). Offering consumers a voluntary choice to obtain a payday or installment loan, and to pre-authorize the withdrawal of loan payments from a consumer's bank account, based on fully disclosed terms cannot be considered likely to inflict “substantial injury” on consumers since it does nothing but increase the financial options available to them. To the contrary, a consumer's free and informed choice to obtain such a loan under fully disclosed terms is highly likely to confer a substantial *benefit* on the consumer, because it strongly indicates that the loan is a better option than any of the available alternatives. But in any event, any “injury” caused by payday or installment loans is plainly “reasonably avoidable” because consumers are entirely free to simply refuse to take out such loans at their own discretion. Similarly, any “injury”

caused by lenders' use of pre-authorized withdrawals is "reasonably avoidable" because consumers have the means to revoke their prior authorizations.

b. In order to be classified as "abusive," a practice must meet one of two conditions: It must either (1) interfere with a consumer's "ability ... to understand a term or condition," or (2) take unreasonable advantage of the consumer's (A) "lack of understanding ... of the material risks, costs, or conditions," or (B) his "inability ... to protect [his] interests," or his (C) "reasonable reliance" on the lender to "act in the interests of the consumer." CFPA § 1031(d), 12 U.S.C. § 5531(d). These statutory criteria ensure that payday and installment loan terms are fully disclosed and reasonably understood, facilitating a fair, arms-length transaction between lenders and the consumers. By contrast, the 2017 Rule prohibits lending practices as "abusive" *regardless* of whether the consumer fully understands all of the terms, risks, conditions, and costs; *regardless* of whether the consumer is fully able to protect his interests by evaluating the relative costs and benefits; and *regardless* of whether the consumer has reasonably relied on the lender to act in his best interest.

c. In any event, as the Bureau itself now recognizes, the unfairness and abusiveness analysis that purported to justify the payments provisions has been repudiated by the Bureau itself, which has disavowed the legal standard used in the 2017 Rule for assessing unfairness and abusiveness under section 1031(c) & (d) of the Act and adopted what the Bureau determined is a better interpretation of the relevant statutory language. The payments provisions cannot be justified—

nor has the Bureau ever tried to justify them—under this correct interpretation of the Bureau’s UDAAP authority.

124. *Second*, Congress set a clear boundary on the Bureau’s authority by unequivocally prohibiting the Bureau from “establish[ing] a usury limit.” CFPA § 1027(o), 12 U.S.C. § 5517(o). The 2017 Rule violates this command because it improperly targets what the Bureau deems to be “high-interest” loans; results from the Bureau’s improper consideration of the cost of credit; determines the legal status of certain covered loans based solely on their interest rate; and, at bottom, rests on the Bureau’s view that covered loans are harmful to consumers because of their high interest rates.

125. *Third*, the 2017 Rule violates Congress’s statutory command that public policy considerations may not serve as a primary basis for an unfairness determination and may not be considered at all in determining whether an act or practice is abusive. *See* CFPA § 1031(c)–(d), 12 U.S.C. § 5531(c)–(d). In violation of these statutory commands, the 2017 Rule’s UDAAP analysis is infused with, and ultimately turns on, public-policy considerations about the undesirability of expensive small-dollar loans.

126. For these reasons, the 2017 Rule is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, and the 2017 Rule must therefore be set aside. 5 U.S.C. § 706(2)(A).

COUNT SIX:

THE PAYMENTS PROVISIONS OF THE 2017 RULE ARE ARBITRARY AND CAPRICIOUS

127. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

128. A court must set aside a rule as arbitrary and capricious if the agency's decision is unsupported by substantial evidence or if the agency has made a clear error in judgment. *See Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007).

129. The Bureau's unfairness and abusiveness determinations are unsupported by substantial evidence and reflect a clear error in judgment.

130. The Bureau mischaracterizes the allegedly harmful consequences of failed payment-transfer attempts. Moreover, these alleged harms (*e.g.*, bank fees for failed transfer payments) are caused by third parties involved in repayment efforts, and it is arbitrary, capricious, and unreasonable for the Bureau to restrict lender and consumer conduct because of perceived abuses by non-lenders.

131. The Bureau's unfairness determination further rests on the claim that the asserted substantial injuries are not reasonably avoidable by consumers. But the Bureau's assertion that there are obstacles to the free exercise of consumer decision-making is speculative, unreasonable, and contradicted by the available evidence.

132. The Bureau's unfairness determination further rests on the claim that the asserted substantial injuries are not outweighed by countervailing benefits to consumers or to competition. The Bureau's analysis here makes three basic errors: (1) the Bureau arbitrarily assigns excessive weight to the asserted injuries, (2) it ignores the benefits to consumers of current payments practices, and (3) it ignores the benefits to competition from current payments practices.

133. An agency action is also arbitrary and capricious if the agency either fails to provide a reasoned explanation for its action or has "entirely failed to consider an important

aspect of the problem” being regulated. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

134. The 2017 Rule’s payments provisions are outside the scope of the Bureau’s statutory UDAAP authority and otherwise arbitrary, capricious, and unsupported by substantial evidence. These provisions purport to be justified by the Bureau’s professed concern about the nonsufficient funds (NSF) and other fees that consumers’ banks might impose on them for failed payment-transfer attempts. But, among other things, the Bureau lacked sufficiently robust and reliable evidence to support the payments provisions; improperly relied on evidence about online lenders to justify provisions applicable to storefront lenders; improperly relied on evidence about single-payment loans to justify provisions applicable to installment loans; improperly confused the cost of a loan with injury; made an entirely arbitrary determination that fees associated with a third (rather than, say, a fifth) attempted withdrawal constitute “substantial injury”; ignored ways that consumers can avoid fees; improperly treated covered lenders, rather than the banks that impose and collect the fees, as the cause of the consumers’ alleged injuries; and ignored that restricting payment-transfer attempts will result in consumer injury in the form of NSF and late-payment fees, defaults, and other costs.

135. Additionally, the payments provisions are unnecessary in light of numerous other federal, state, and industry rules that regulate payments.

136. Moreover, in restricting payment-transfer attempts, the Bureau failed to take into account the nuances in different types of payment transfers. The 2017 Rule’s payments provisions treat debit-card and prepaid-card payments the same as check and ACH payments. But these transactions are not the same. Whereas ACH and check payment transfers may cause consumers to incur fees from multiple failed attempts to withdraw funds—which is the alleged

harm the payments provisions purport to address—debit-card transactions almost never result in insufficient funds fees. The Bureau failed to examine debit-card payment data, and instead relied on ACH transfer data to create this blanket rule.

137. The Bureau likewise failed to take into account nuances in different types of loans. The 2017 Rule's payments provisions not only limit payment-transfer attempts for single-payment loans and for payments of a single installment of a multi-payment installment loan, but also limit payment-transfer attempts across multiple installments of a multi-payment installment loan. However, the Bureau lacked reliable data analyzing NSF fees in the context of installment loans. And the payments provisions are particularly unjustifiable for installment loans because, among other things, consumers have significant opportunities to avoid fees from one installment payment to the next. For example, a consumer can ensure that sufficient funds are deposited to cover his next installment payment or can contact his lender to obtain an extension or arrange another payment option.

138. The Rule's requirements relating to *when* payment notices must be provided is also arbitrary and capricious. The Rule requires a first payment withdrawal notice or an unusual withdrawal notice to be mailed no later than six business days prior to the first payment transfer or the unusual withdrawal, thereby arbitrarily preventing consumers from scheduling earlier payments. That restriction will harm consumers by forcing some consumers to incur additional costs resulting from loans of longer duration than they would prefer.

139. The Bureau also failed to take into account the fact that the problems it identifies can be addressed through alternative measures that mitigate or ameliorate unnecessary, harmful burdens. In particular, the Bureau has failed to consider whether any lack of consumer understanding that may exist regarding the risks of payment practices associated with payday

and installment loans could be addressed through an enhanced disclosure regime. Disclosure is the backbone of federal consumer credit law, from the Truth in Lending Act to the CFPA, and yet the Bureau has made no attempt to explain why disclosure requirements that are sufficient in a host of other financial-services contexts are somehow insufficient in this context.

COUNT SEVEN:

DEFECTIVE COST-BENEFIT ANALYSIS

140. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

141. The CFPA requires the Bureau to consider “the potential benefits and costs to consumers and covered persons [i.e., lenders], including the potential reduction of access by consumers to consumer financial products” and “the impact on consumers in rural areas.” CFPA § 1022(b)(2), 12 U.S.C. § 5512(b)(2). Such cost-benefit analyses are inadequate if, inter alia, the agency: relies on estimates that “ha[ve] no basis beyond mere speculation”; fails to estimate costs that are quantifiable; completely discounts available studies in favor of relatively unpersuasive studies; fails to adopt a reasonable baseline so as to account for the marginal costs of the rule; “duck[s] serious evaluation of” certain costs; engages in internally inconsistent reasoning; and fails to address requested exceptions for entities that are situated differently for purposes of costs and benefits. *Business Roundtable v. SEC*, 647 F.3d 1144, 1150–55 (D.C. Cir. 2011).

142. The Bureau’s cost-benefit analysis of the payments provisions is defective because it improperly relied on the Bureau’s conclusion that the costs imposed by the payments provisions on lenders were mitigated by the underwriting provisions. Now that the underwriting provisions have been revoked, there is no valid cost-benefit analysis supporting the payments provisions.

143. The Bureau’s cost-benefit analysis is defective because the Bureau failed to consider many the costs to consumers, including the loss of convenience, the cost of depriving consumers of their free choice to make financial decisions, the increased likelihood that a loan will enter into collections sooner than it otherwise would have (if at all), and the full magnitude of increased loan costs and fewer credit options. Additionally, the Bureau failed to consider that, as a result of the Rule's requirement that payment notices and unusual withdrawal notices be provided at least six business days prior to the first payment transfer and the unusual withdrawal, some consumers will face additional loan costs because of the inability to schedule earlier payments.

COUNT EIGHT:

FAILURE TO OBSERVE PROCEDURE REQUIRED BY LAW

144. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

145. The APA forbids agency action that is “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

146. In promulgating the 2017 Rule, the Bureau violated at least four procedural requirements.

147. First, for a notice-and-comment rulemaking process to be meaningful under the APA, the agency must actually evaluate the information presented during the process, rather than dismiss it to reach a pre-ordained result. Here, however, the history of the rulemaking that led to the 2017 Rule demonstrates that, under its former Director (who was unconstitutionally insulated from presidential control), the Bureau failed to consider or evaluate empirical studies or evidence that diverged from the Bureau’s pre-determined decision that payday lending and installment lending are harmful and must be burdened by draconian regulations. Under its former Director, the Bureau repeatedly made statements and issued publications riddled with errors and

misperceptions. CFSA and others attempted to correct these errors and misperceptions, but to no avail. Instead, the Bureau under its former Director doubled-down on its earlier errors through first the proposed rule and then the 2017 Rule, which suffers from the same methodological and evidentiary defects. Because the Bureau under its former Director refused to rationally consider the evidence and instead dismissed every cited study's conclusion as incorrect, it abused its discretion and acted arbitrarily and capriciously.

148. Second, based on information obtained under the Freedom of Information Act (FOIA), as well as other information and belief, the Bureau under its former Director largely allowed outside groups opposed to payday lending to drive the rulemaking that led to the 2017 Rule, and did not adequately disclose its reliance on these groups. Because the Bureau so allowed these special-interest groups to dictate the scope and text of the 2017 Rule while ignoring the concerns of lenders and borrowers, the agency reduced the elaborate rulemaking process to little more than a sham.

149. Third, the Bureau under its former Director failed to comply with the Regulatory Flexibility Act (RFA) by failing to adequately assess the 2017 Rule's impact on small businesses and by improperly going through the motions of a small-business-review panel process under the Small Business Regulatory Enforcement Fairness Act (SBREFA) without any meaningful thought or analysis towards a foregone conclusion. Under the SBREFA, an agency must, at the time of issuance of a notice of proposed rulemaking, publish an initial regulatory flexibility analysis which "shall describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a). That initial analysis must also describe "any significant alternatives to the proposed rule which accomplish the stated objectives" of the applicable statute while minimizing significant economic impact on small entities. *Id.* § 603(c). And the final analysis published with

the final rule must explain how the agency has minimized the impact of the rule on small entities and why it has rejected alternatives. *Id.* § 604(a)(6). Here, the Bureau failed to adequately take into account the impacts on small businesses, as demonstrated by the blistering comment submitted in opposition to the rule by the Chief Counsel for Advocacy of the Small Business Administration.

150. Fourth, the APA requires that the agency “shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments” and that the agency give “consideration” to “the relevant matter presented.” 5 U.S.C. § 553(c). During the period for such submissions, the Bureau received more than 1.4 million written comments from interested persons, including over one million comments from consumers who opposed the proposed rule. Showing disdain for the views of those who will be most affected by the 2017 Rule, however, the Bureau failed to adequately take these highly relevant comments into account or give them the individualized consideration required by the APA.

COUNT NINE:

ARBITRARY AND CAPRICIOUS DENIAL OF RULEMAKING PETITION

151. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

152. Advance Financial’s rulemaking petition explained why the payments provisions of the 2017 Rule should not apply to debit-card transactions. Whereas ACH and check payment transfers may cause consumers to incur fees from multiple failed attempts to withdraw funds, debit-card transactions almost never result in insufficient funds fees. The Bureau’s denial of the petition was therefore arbitrary and capricious.

153. The denial of the rulemaking petition was also arbitrary and capricious because the Bureau reached its decision without considering whether application of the payments

provisions to debit-card transactions was warranted under the revised legal interpretation of the Bureau's UDAAP authority described in the Revocation Rule.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for an order and judgment in their favor and against defendants comprising the following relief:

1. an order and judgment holding unlawful, enjoining enforcement of, and setting aside the 2017 Rule and the purported ratification of the 2017 Rule;
2. in the alternative, an order requiring the Bureau to engage in rulemaking to modify the payments provisions of the 2017 Rule;
2. costs and attorneys' fees pursuant to any applicable statute or authority; and
3. any other relief that the Court deems just and appropriate.

Dated: August 28, 2020

Respectfully submitted,

/s/ Laura Jane Durfee

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