LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

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Director Kathy Kraninger
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

RE: Payday, Vehicle Title, and Certain High-Cost Installment Loans, Docket No. CFPB-2019-0006

Dear Director Kraninger:

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") respectfully submits these comments on the Notice of Proposed Rulemaking by the Consumer Financial Protection Bureau ("CFPB"), entitled *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, Docket No. CFPB-2019-0006 ("NPRM"). The NPRM proposes to rescind key provisions of the 2017 Final Rule governing "Payday, Vehicle Title, and Certain High-Cost Installment Loans" ("2017 Final Rule").[1]

The Lawyers' Committee is a nonpartisan, nonprofit organization formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination. The Lawyers' Committee's mission is to create legal, economic, and social equity through litigation, education, and advocacy. Although the organization fights discrimination against all people, it specifically recognizes the key role that current and historic race discrimination plays in sustaining inequities. It is therefore crucially important for the legal community to identify, expose, and dismantle systems that sustain racial inequities. The payday loan marketplace, as currently structured, is one such system.

The original 2017 Final Rule was developed after Notice and Comment, extensive written input from interested parties, and the considered discretion of the CFPB. It provides essential protections from unfair and abusive practices, all of which are clearly within the Bureau's statutory mandate. The harms that the 2017 Final Rule was designed to prevent include abusive and unfair lending practices to individuals suffering from financial hardship, with little to no federal oversight of the Underwriting Requirements. As documented in the rulemaking record, such abusive lending practices trap millions of financially vulnerable Americans in never-ending cycles of debt, including, to a disproportionate extent,

[1] *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 12 C.F.R. pt. 1041 (2017) [hereinafter *2017 Final Rule*].

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in communities of color.[2] The individuals most severely harmed by the proposed rescission include women, people of color, and other racial and ethnic communities who are disproportionately targeted by payday lenders.

Now, without providing a reasoned explanation for disregarding the facts and circumstances that underlie or were a catalyst for the prior policy (or any evidence contradicting that determination), the CFPB seeks to withdraw these essential protections. Withdrawing these protections puts consumers, especially disproportionately impacted communities of color, at risk of the harms the Underwriting Requirements of the 2017 Final Rule sought to protect against.

Moreover, the proposed rollback has occurred against the backdrop of troubling developments at the CFPB that threaten the integrity and mission of the agency tasked with protecting consumers from predatory practices within the financial industry. Specifically, the CFPB has shown a lack of zealous enforcement against payday lenders, including instances of closing and settling cases;[3] filing for a stay in the enforcement date of the 2017 Final Rule in litigation in the Western District of Texas;[4] allegations of undue influence by the payday lending industry on specific academic studies of payday loans;[5] the closing of the consumer advisory council;[6] allegations of close ties between former CFPB director Mick Mulvaney and the payday lending industry;[7] and reported explicit and implicit racial bias by political appointees in the CFPB's office of consumer lending.[8]

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[2] 82 Fed. Reg. 54472, 54557.

[3] Evan Weinberger, *Enforcement Slowdown Defines Mulvaney's CFPB Tenure (1)*, Bloomberg Law (Nov. 26, 2018, 3:20 PM), https://news.bloomberglaw.com/banking-law/enforcement-slowdown-defines-mulvaneys-cfpb-tenure-1 (not cited in 2017 Final Rule).

[4] Kate Berry, *Payday Lenders Get Unexpected Reprieve from CFPB Rule*, American Banker (Mar. 22, 2019, 4:07 PM), https://www.americanbanker.com/news/payday-lenders-get-unexpected-reprieve-from-cfpb-rule (not cited in 2017 Final Rule).

[5] Renae Merle, *How a Payday Lending Industry Insider Tilted Academic Research in its Favor*, The Washington Post, (Feb. 25, 2019) https://www.washingtonpost.com/business/2019/02/25/how-payday-lending-industry-insider-tilted-academic-research-its-favor/?utm_term=.55c146343634 (not cited in 2017 Final Rule).

[6] Congresswoman Maxine Waters, *Waters Statement on Mulvaney's Decision to Fire All Members of the Consumer Bureau's Advisory Board*, U.S. House Committee on Financial Services (June 6, 2018) (not cited in 2017 Final Rule). https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=401424.

[7] Consumers Under Attack, *Mulvaney Has Always Been a Payday Industry Puppet* (last visited May 7, 2019), https://consumersunderattack.org/topics/payday-loans/mulvaney-has-always-been-a-payday-industry-puppet/ (not cited in 2017 Final Rule).

[8] Glenn Thrush, *Federal Anti-Discrimination Official Under Fire for Racial Comments*, The New York Times (Oct. 3, 2018), https://www.nytimes.com/2018/10/03/us/politics/consumer-bureau-blankenstein-racial-comments.html; Kate Berry and Rachel Witkowski, *Top CFPB*

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The Lawyers' Committee strongly opposes the proposed rollback of the Underwriting Requirements of the 2017 Final Rule, which provide essential protections for consumers—and in particular communities of color and other marginalized communities that the Lawyers' Committee serves—from unfair and abusive practices associated with payday, vehicle title, and high-cost installment loans ("covered loans").

The Lawyers' Committee submits this comment to raise both factual and legal challenges to the NPRM.

First, we provide our views on critical policy benefits supporting the CFPB's finding in the Final Rule that making covered loans without the Rule's Underwriting Requirements is both an unfair and abusive practice, particularly to communities of color. To that end, the Lawyers' Committee attaches a May 2019 report from the economic consulting firm, Bates White LLC, entitled "Report Reviewing Research on Payday, Vehicle Title, and High-Cost Installment Loans" ("Bates White Report") for the CFPB's consideration. The report summarizes in-depth research demonstrating that the unfair and abusive practices set forth in the CFPB's determinations in the 2017 Final Rule do in fact substantially injure consumers of covered loans without the Underwriting Requirements, particularly consumers of color, and those consumers cannot reasonably avoid this injury. Specifically, the report reached the following conclusions:[9]

> 1) borrowers of covered loans are disproportionately low-income and disproportionately minorities;
> 2) lenders of covered loans target communities with a high concentration of minorities;
> 3) lenders of covered loans charge higher prices in minority neighborhoods;

Official Yanks Support for Political Appointee Over Past Writings, American Banker (Sept. 28, 2018, 5:53 PM), https://www.americanbanker.com/news/top-cfpb-official-yanks-support-for-political-appointee-over-past-writings; Kate Berry and Rachel Witkowski, *'It is an issue for all of us': Dissent Spreads at CFPB Over Top Aide's Writing*, American Banker (Sept. 30, 2018, 7:38 PM), https://www.americanbanker.com/news/it-is-an-issue-for-all-of-us-dissent-spreads-at-cfpb-over-top-aides-writings; Adam K. Raymond, *Trump Appointee Charged With Stopping Racist Lenders Wrote Racist Blog Posts*, Intelligencer (Sept. 27, 2018), http://nymag.com/intelligencer/2018/09/cfpbs-anti-discrimination-head-once-had-a-racist-blog.html (not cited in 2017 Final Rule).

[9] *See* Bates White LLC, *Report Reviewing Research on Payday, Vehicle Title, and High-Cost Installment Loans* (forthcoming May 2019) (report attached) [hereinafter *Bates White Report*] (not cited in 2017 Final Rule).

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4) borrowers of covered loans may not understand the loan terms or the risks associated with the loan; and
5) access to covered loans can have negative impacts on consumers.[10]

As discussed below, these factual conclusions have not been subject to an adequately reasoned explanation for being disregarded in the current NPRM.

Second, we provide our views on how the CFPB's proposed rescission fails to meet its burden for a government agency to change or depart from a previously announced final rule. The rollback of the 2017 Final Rule appears to have been driven purely by a change in administration and longstanding animus to the mission of the CFPB by certain members of the current administration, including recent CFPB leadership. There is little to no factual support for the CFPB's action here. The CFPB provides only anecdotal and legally insufficient reasons why it believes it should swing 180 degrees from the CFPB's prior findings during the previous administration, which were reflected in an extremely robust administrative record developed over five years. In contrast, the current administration announced its intent to rescind the Rule mere weeks after a change in CFPB leadership.[11] The CFPB fails to justify the rollback with a reasoned explanation for disregarding facts and circumstances that underlie or were a catalyst for the prior policy, and therefore the proposed rescission is arbitrary and capricious in violation of the law.

For these reasons, and as set forth in more detail below, the 2017 Final Rule rollback is factually and legally unjustified on the rulemaking record and will be subject to challenge upon issuance. The CFPB must reconsider its proposal.

I. Factual Background

The 2017 Final Rule applies to loans that require consumers to repay all or most of their debt at once, including payday loans, auto title loans, deposit advance products, and longer-term loans with balloon payments ("covered

[10] *Id.* at 1.
[11] Chris Arnold, *Under Trump Appointee, Consumer Protection Agency Seen Helping Payday Lenders*, NPR (Jan. 24, 2018), https://www.npr.org/2018/01/24/579961808/under-trump-appointee-consumer-protection-agency-seen-helping-payday-lenders (not cited in 2017 Final Rule).

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loans").[12] These types of loans are well-documented to push borrowers into cyclical debt (referred to as "debt traps" or "debt-treadmills") and thereby deprive consumers of financial control. Debt traps caused by covered loans are characterized by high payments and associated fees which make it impossible for the borrower to repay the original loan, interest, and fees. Borrowers are then forced to take out new payday loans with continually increasing fees to pay back the previous loan, ultimately having to pay a single final "balloon" payment that they cannot afford.

a. Rescinded Provisions

In promulgating the 2017 Final Rule, the CFPB concluded that it is both an unfair and abusive practice for a lender to make a covered loan without first reasonably determining that the consumer will have the ability to repay the loan.[13] To prevent such practices, the 2017 Final Rule imposed Underwriting Requirements that require lenders to conduct a "full-payment test" to determine upfront a borrower's ability to repay the loan while also meeting major financial obligations and basic living expenses without needing to reborrow over the next 30-days.[14]

In particular, the CFPB is proposing to rescind the following mandatory Underwriting Requirements:

(i) the "identification" provision, finding that it is an unfair and abusive practice for a lender to make a covered loan without

[12] Consumer Financial Protection Bureau, *CFPB finalizes rule to stop payday debt traps* (Oct. 5, 2017), http://files.consumerfinance.gov/f/documents/201710_cfpb_fact-sheet_payday-loans.pdf.

[13] *See* 12 C.F.R. § 1041.4; *see also 2017 Final Rule,* supra note 1, at 441-54 (finding, based on surveyed data, that absence of determination causes substantial injury to consumers, including those associated with default, delinquency, and re-borrowing, as well as the negative collateral consequences of being forced to forgo major financial obligations or basic living expenses to cover the unaffordable loan payment); *id.* at 454-71 (finding that injury is not reasonably avoidable due to consumer behavioral issues); *id.* at 471-522 (finding that countervailing benefits do not outweigh harms); *id.* at 545-69 (finding practice of issuing covered loans without assessing consumers' ability to repay is abusive because it takes unreasonable advantage of consumer vulnerabilities in tight economic circumstances).

[14] The 2017 Final Rule defines major financial obligations as a consumer's housing expense, minimum payments under debt obligations (including outstanding covered loans), child support obligations, and alimony obligations. It also defines basic living expenses as expenditures, other than payments for major financial obligations, that a consumer makes for goods and services that are necessary to maintain the consumer's health, welfare, and ability to produce income, and the health and welfare of financial dependents. *See* 12 C.F.R. § 1041.5(a)(1).

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reasonably determining that consumers will have the ability to repay the loans according to their terms;[15]

(ii) the "prevention" provision, which establishes specific underwriting requirements for these loans to prevent the unfair and abusive practice;[16]

(iii) the "conditional exemption" provision, for certain covered short-term loans;[17] and

(iv) the "furnishing" provisions, which require lenders making covered loans to furnish certain information regarding such loans to registered information systems (RISes) and create a process for registering such information systems.[18]

In addition, the NPRM proposes to rescind portions of the 2017 Final Rule's recordkeeping provisions relating to the Underwriting Requirements.[19]

b. Impacted Communities

The borrowers of covered loans are typically low income, struggle financially, and have difficulty accessing credit and covering ordinary living expenses.[20] The average income of a typical covered loan borrower is approximately $30,000. Many borrowers are not fully employed: just 49 percent of all payday loan borrowers are employed full-time, 14 percent are unemployed, and 13 percent are employed part-time.[21] Further, borrowers who self-identified as disabled or unemployed in a national survey from the Pew Research Center were the most likely to have used a loan of any employment group, with usage rates of 12 and 10 percent respectively.[22] Most consumers of payday loans report

[15] 12 C.F.R. §§ 1041.7 to 1041.9, 1041.12.
[16] *Id.* § 1041.4.
[17] *Id.* § 1041.5.
[18] *Id.* § 1041.6.
[19] *Id.* §§ 1041.10 to 1041.11.
[20] The Pew Charitable Trusts, *Payday Lending in America: Report 2, How Borrowers Choose and Repay Payday Loans*, 10 (Feb. 2013) [hereinafter *Pew Study*], http://www.pewtrusts.org/~/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-(1).pdf#page=10.
[21] The Pew Charitable Trusts, *Payday Lending in America: Report 1, Who Borrows, Where They Borrow, and Why*, Appendix A (July 2012), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pd.
[22] *Id.* at 11.

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paying bank overdraft fees and have little available credit.[23] Almost all have a damaged credit history that makes them ineligible for mainstream consumer credit, with credit scores that are at the lowest end of the scale.[24]

Borrowers of covered loans are disproportionately concentrated in communities of color.[25] A report from 2018, citing data compiled by the Federal Deposit Insurance Corporation, found that households with a head of household who is black, an immigrant, or speaks Spanish only are "more likely to be unbanked and using alternative financial services" such as payday loans, check cashing, and tax refund loans.[26] This study, published after the 2017 Final Rule, found a "strong relationship between a lack of mobility, low access to financial services, and a high concentration of people of color," each of which are factors that drive demand for high-cost alternative financial products. The study also observed a "strong relationship between … low access to financial services [] and a high concentration of people of color," and that the low access to financial services that characterizes so-called "banking deserts" significantly undermined rates of asset building among low-income households.[27] A March 2016 Center for Responsible Lending report focused on Florida observed that the economic harms from payday lending were disproportionately concentrated in Florida's black and Latino communities.[28] An internal Defense Department study determined that military personnel (who are disproportionally persons of color) are also more

[23] The Pew Charitable Trusts, *Comments Re the Proposed Rule*, Regulations.gov, at 17 (Oct. 7, 2016)
(citing Neil Bhutta, Paige Marta Skiba, and Jeremy Tobacman, Payday Loan Choices and Consequences, Oct. 11, 2012, Vanderbilt Law and Economics Research Paper No. 12-30, 13, http://dx.doi.org/10.2139/ssrn.2160947. Fifty-nine percent of borrowers in the dataset have a credit card.), https://www.regulations.gov/contentStreamer?documentId=CFPB-2016-0025-142716&attachmentNumber=1&contentType=pdf

[24] The Pew Charitable Trusts, *Payday Lending in America: Report 3, Policy Solutions*, 53 (Oct. 2013),
http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2013/pewpaydaypolicysolutionsoct2013pdf.pdf#page=59.

[25] *Bates White Report*, *supra* note 9, at 6-10.

[26] William J. Bynum, Diana Elliott, and Edward Sivak, *Opening Mobility Pathways by Closing the Financial Services Gap*, 3, 6 (Feb. 2018),
https://www.mobilitypartnership.org/opening-mobility-pathways-closing-financial-services-gap (not cited in 2017 Final Rule).

[27] *Id.* at 6-7.

[28] Brandon Coleman and Delvin Davis, *Perfect Storm: Payday Lenders Harm Florida Consumers Despite State Law*, Center for Responsible Lending (Mar. 2016),
http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_perfect_storm_florida_mar2016.pdf.

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likely to take out payday loans and are "twice as likely as civilians to be a payday borrower."[29]

Women, especially those of color, disproportionately consume covered loans, which has further perpetuated the debt cycle, wealth inequity, and lack of social mobility for this community, among other harms. A report by the Pinklining project (which was not cited in the 2017 Final Rule) noted that "60% of payday loan customers are women. Higher rates of usage are mostly among single mothers, women who are between 25- 44 years old, women who earn $40,000 and below, renters, Latina and Black women, and/or women who are unable to work due to a disability."[30] A very significant portion of women surveyed (47%) responded that they were "unable to save money" as a result of taking out high-cost debt, which includes covered loans.[31] Furthermore, "20% responded that they could not afford health care, 19% responded that they had to delay purchasing a car, and 18% responded that they had difficulty affording adequate food" and 25% responded that their credit score went down.[32]

These disproportionate rates of usage and harm among communities of color are not solely a byproduct of poverty. Lenders of covered loans target communities with a high concentration of persons of color. Payday lenders are disproportionately located in communities of color. For example, Chicago's African-American and Latino neighborhoods have almost three times more payday lenders than white neighborhoods.[33] The same is true of black neighborhoods in North Carolina, even after controlling for income and poverty levels.[34] According to one study in California, the ratio is eight to one.[35]

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[29] *See Bates White Report*, *supra* note 9, at 9-10 (citing U.S. Department of Defense, *Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents*, 13 (Aug. 9, 2006), http://archive.defense.gov/pubs/pdfs/report_to_congress_final.pdf.

[30] Suparna Bhaskaran, *How Wall Street's Predatory Products Pillage Women's Wealth, Opportunities and Futures*, The ACCE Institute, 5, 17 (June 2016), https://d3n8a8pro7vhmx.cloudfront.net/acceinstitute/pages/100/attachments/original/1466121052/acce_pinklining_VIEW.pdf?1466121052 (not cited in 2017 Final Rule).

[31] *Bates White Report*, *supra* note 9, at 27.

[32] *Id.*

[33] Natalie Moore, *Payday lenders concentrated in minority communities*, WBEZ (Feb. 10, 2011), https://www.wbez.org/shows/wbez-news/payday-lenders-concentrated-in-minority-communities/4761e6c2-a0a6-4ab7-9459-ec9bc346206d (not cited in 2017 Final Rule).

[34] *Race Matters: The Concentration of Payday Lenders in African-American Neighborhoods in North Carolina*, Center for Responsible Lending (Mar. 22, 2005), http://www.responsiblelending.org/research-publication/race-matters-concentration-payday-lenders-african-american-neighborhoods-north (not cited in 2017 Final Rule).

[35] Center for Responsible Lending, *Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California*, 2 (Mar. 26, 2009),

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Nationwide, the ratio of payday lenders in African-American or Latino neighborhoods versus white neighborhoods is about two to one.[36]

Individuals and households in communities of color are more likely to lack access to traditional financial services and thus to rely on products like payday loans.[37] Payday lenders also target persons of color by preying on this vulnerability by advertising covered loans as last-resort lending to serve short-term emergencies.[38] Consistent with these findings, Sullivan, et al. (2015) (which was not cited in the 2017 Final Rule) observe that although notorious practices such as redlining to exclude black buyers from mortgage markets have been prohibited for decades, "[d]iscriminatory lending practices persist to this day," including "the proliferation of high-cost credit options such as payday lenders in many neighborhoods of color, combined with the scarcity of banks and credit unions."[39] Payday lenders use celebrities of color and community leaders in covered loan advertisements because "prospective borrowers are more likely to obtain a predatory loan when it is marketed by someone considered trustworthy in their communities."[40] This targeting is exacerbated by the fact that certain populations of color display the lowest level of financial literacy among racial and ethnic groups.[41]

II. Legal Standard for Rescission

Pursuant to § 1301(b) of the Dodd-Frank Act, the CFPB has the authority to prescribe rules to regulate "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."[42]

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http://www.responsiblelending.org/payday-lending/research-analysis/predatory-profiling.pdf (not cited in 2017 Final Rule).

[36] Donna Tam, *Are payday loans hurting minorities?*, Marketplace (Mar. 24, 2016). https://www.marketplace.org/2016/03/24/world/are-payday-loans-are-hurting-minorities.

[37] Bynum et al., *supra* note 26, at 3 and 6 (not cited in 2017 Final Rule).

[38] *Bates White Report*, *supra* note 9, at 11-18; *see also* Bynum et al., *supra* note 26, at 6-7.

[39] Sullivan et al., *The Racial Wealth Gap: Why Policy Matters*, Demos, 10 (2015), https://www.demos.org/sites/default/files/publications/RacialWealthGap_1.pdf (not cited in 2017 Final Rule).

[40] *Bates White Report*, *supra* note 9, at 17.

[41] *Id.*

[42] 12 U.S.C. § 5531(b).

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Under the APA, agency action is evaluated under an arbitrary and capricious standard.[43] In the landmark decision of *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44 (1983), the United States Supreme Court affirmed that the arbitrary and capricious standard applies to "rescissions of prior agency regulations." An agency action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[44] In *Fox Television*, the Supreme Court clarified that an agency change of course is not subject to a heightened standard of review; instead, it is analyzed the same as when an agency acts in the first instance.[45] Nonetheless, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[46] Moreover, the agency decision must be justified by facts in the rulemaking record, and not a record created after the fact in court.

To justify the rescission, the NPRM explains that the CFPB now preliminarily believes the evidence underlying the identification of payday loan practices as unfair and/or abusive is "not sufficiently robust and reliable to support that determination, in light of the impact those provisions will have on the market for covered … loans, and the ability of consumers to obtain such loans."[47] Moreover, the CFPB now states that it is not aware of any additional evidence that would provide the support needed for key findings that are essential to such a determination and that it does not believe it is cost-effective for itself or for lenders and borrowers to conduct the necessary research to try to develop those key findings. The CFPB therefore now proposes to rescind the unfair and abusive practice identifications in their entirety.

The CFPB promulgated the 2017 Final Rule after five years of research, outreach, and review of more than 1.4 million public comments from payday borrowers, consumer advocates, faith leaders, payday and auto title lenders, tribal leaders, state regulators, attorneys general, and others. The 2017 Final Rule's administrative record unequivocally demonstrated that covered loans provided without the Underwriting Requirement protections prescribed in the 2017 Final

[43] 5 U.S.C. § 706(2)(A).
[44] *Id*. at 43.
[45] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009).
[46] *Id*. at 516.
[47] NPRM at 5.

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Rule are "unfair" and "abusive" practices under the Consumer Financial Protection Act.

The CFPB's proposed rollback is arbitrary and capricious in violation of law for at least two reasons, discussed below. First, the CFBP's decision was not justified by the facts in the rulemaking record. Second, the CFPB disregarded the facts and circumstances that underlie or were the catalyst for the prior policy.

III. The NPRM ignored or misconstrued facts in the rulemaking record that supported the CFPB's conclusion that payday lending is an "unfair" practice

Contrary to the five-year rulemaking record supporting the CFPB's Final Rule, the NPRM portrays the factual basis of the Rule's abusive and unfairness practice findings as relying on two studies primarily—the Mann Study and Pew Charitable Trust Survey.[48] The CFPB's cursory and selective critique of these two studies led it to conclude unreasonably that the CFPB had relied on insufficiently robust or reliable evidence to support these determinations in the Final Rule. In doing so, the CFPB failed to acknowledge or consider the scores of other studies and reports otherwise in the record that also supported the CFPB's unfairness and abusiveness determinations in the Final Rule. Furthermore, the additional evidentiary research from the Bates White Report, noted below, further supports the CFBPs original findings and indicates that the CFPB's disregard of these facts is unreasonable. Each of the "unfairness" findings required by the CFPB under the Dodd-Frank Act is discussed below.

a. Legal Standard for "Unfair" Practices

In order to declare an act or practice unfair, the CFPB must have 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."[49]

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[48] Ronald Mann, *Assessing the Optimism of Payday Loan Borrowers*, 21 Supreme Court Econ. Rev. 105 (2013) [hereinafter *Mann Study*]; *see also Pew Study*, *supra* note 20.

[49] 12 U.S.C. § 5531(c)(1).

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b. Covered loans without Underwriting Requirements cause "substantial injury" to consumers by imposing extremely high, unaffordable payments that force borrowers into debt traps without any countervailing benefits

Payday lending substantially injures consumers by exacerbating the already costly and deceptive financial ecosystem for unbanked and underbanked consumers. One study found that Americans with annual household incomes under $30,000 pay more than three times the monthly bank fees paid by higher income brackets.[50] Without access to affordable banking, low-income consumers pay more in fees for money orders, wire transfers, bill payments, and other common financial transactions as well.

The exceptionally high repayment costs associated with repaying payday loans makes repayment almost impossible for many borrowers. If borrowers are able to repay, doing so requires borrowers to sacrifice paying for basic living necessities. For example, the average cost of a two-week $500 payday loan is $75, which corresponds to an Annual Percentage Rate ("APR") of 391%.[51] A typical vehicle title loan has a term of one month and a median loan size just under $700, with fees that are equivalent to an APR of around 300%.[52] Installment payday loans are generally larger than single-payment payday loans, with a median size of $1,000 storefront and $2,400 online and an overall median APR of 248% storefront and 221% online.[53] Installment vehicle-title loans have a median size of $710 and a median APR of 259%. As detailed in Section I, typical consumers of payday loans are already struggling financially and cannot afford to pay extremely high amounts for payday loans that often end up taking longer to pay off than previously expected. As a result, consumers sacrifice their spending for basic living expenses. Subjecting consumers to such costs without the Underwriting Requirements proposed by the Final Rule would cause substantial injury by exacerbating and perpetuating the debt cycle of already financially vulnerable communities.

[50] Colin Dwyer, *Bank of America Ends Free Checking Option, A Bastion For Low-Income Customers*, National Public Radio (Jan. 24, 2018), https://www.npr.org/sections/thetwo-way/2018/01/24/580324251/bank-of-america-ends-free-checking-option-a-bastion-for-low-income-customers (not cited in 2017 Final Rule).

[51] Consumer Financial Protection Bureau, *Supplemental findings on payday, payday installment, and vehicle title loans, and deposit advance products* (June 2, 2016). https://files.consumerfinance.gov/f/documents/Supplemental_Report_060116.pdf .

[52] *Id.* at 10.

[53] *Id.* at 11.

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The high payments, associated fees, and single final "balloon" payments associated with covered loans cause consumers to fall victim to debt traps. Studies have found that only 14% of borrowers can meet the short-term payback deadline while up to 50% of payday loans are extended and rolled over 10 times.[54] The process of repeated borrowing to cover the amount taken out for the original loan is a "business plan of the payday lending industry" and generates nearly $3.5 billion annually.[55] Many lenders of covered loans automatically renew loans and automatically make withdrawals to consumers' checking accounts on fixed dates that are often after every pay day. These lenders can automatically withdraw the rollover fees or finance charges from the consumer's bank account through ACH agreements or post-dated checks signed by the payee at the time of the agreement.

These extremely high rates of deferral, rollover and default are not only injurious to consumers, but are also not indicative of a properly functioning lending market. By comparison, student loan defaults are estimated to be between 10-15%, according to the Department of Education.[56] At the peak of the housing crisis, the home mortgage loan default rate peaked at nearly 10%.[57] Both statistics (which were published after the 2017 Final Rule publication) have sparked alarm among relevant governmental agencies. Yet the covered loan market, which has far higher rates of default, is now subject to regulatory rollback.

Research shows that covered loans are correlated with harmful economic and social impacts on consumers and communities—especially consumers and communities of color. This includes reduced readiness and performance for military personnel who are disproportionate users of covered loans; increased financial fragility and borrower delinquency; inability to pay important bills and prioritize other liabilities (e.g. child support payments); loss of transportation due to vehicle repossession; a substantial increase in the probability of being past due on credit card debt; an increased likelihood of family hardship; and an increased likelihood of postponing health care.[58] Usage of certain covered loans is also

[54] Bhaskaran, *supra* note 30, at 37 (citing Payday Lending in America, Pew Charitable Trust, Oct
2013.)
[55] *Id.*
[56] U.S. Department of Education, *National Student Loan Cohort Default Rate Falls* (Sept. 26, 2018), https://www.ed.gov/news/press-releases/national-student-loan-cohort-default-rate-falls (not cited in 2017 Final Rule).
[57] Statista, *Mortgage Delinquency Rates in the United States from 2000 to 2017* (last visited May 8, 2019), https://www.statista.com/statistics/205959/us-mortage-delinquency-rates-since-1990/ (not cited in 2017 Final Rule).
[58] *Bates White Report*, *supra* note 9, at 27.

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associated with "poor health conditions such as high blood pressure and anxiety."[59]

c. Substantial injuries caused by covered loans without Underwriting Requirements are not "reasonably avoidable" to consumers because consumers cannot anticipate the likelihood of the abovementioned injuries

The NPRM erroneously argues that the Final Rule was based on a misstatement of the avoidability standard.[60] This strawman argument fails. The CFPB must provide a reasoned basis for its contrary conclusion regarding the evidence. Further, the CFPB's ruling that injury is reasonably avoidable is not justified by facts in the rulemaking record. The ruling ignores or selectively and incorrectly interprets evidence on the extensive 2017 Final Rule record. Last, the NPRM provides no new evidence contradicting the CFPB's original avoidability finding.

The CFPB in the 2017 Final Rule stated the standard for determining reasonable avoidability as follows: "[U]nless consumers have reason generally to anticipate the likelihood and severity of the injury and the practical means to avoid it, the injury is not reasonably avoidable."

The CFPB went on in the 2017 Final Rule to make the following conclusion:

> Under the proposed rule, the Bureau stated that in a significant proportion of cases, consumers appear to be unable to reasonably avoid the substantial injuries caused or likely to be caused by the identified practice. Prior to entering into a payday, single-payment vehicle title, or other covered short-term loan, many consumers do not reasonably anticipate the likelihood and severity of the injuries that frequently result from such unaffordable loans, and after entering into the loan, consumers do not have the practical means to avoid the injuries that result from being unable to repay it.[61]

The CFPB argued in the NPRM that the 2017 Final Rule standard for avoidability was that a stated practice (i.e. taking out a loan without ability-to-pay

[59] *Id.*
[60] See NPRM 63-72 (The NPRM does not challenge the 2017 Final Rule determination that the injuries caused by payday lending are not reasonably avoidable.)
[61] *See* 82 Fed. Reg. 54472, 54954.

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protections) is unfair unless consumers have a "specific understanding" of the risks associated with taking out such a loan. By misconstruing the "unfairness" standard in the 2017 Final Rule, the CFPB in the NPRM claims that the 2017 Final Rule sought to ensure that every consumer *"specifically"* understand the risks of taking out covered loans.[62] The CFPB then noted that this standard was too high, and that, even when rescinding the proposed protections, consumers are still *generally* aware of the risks of taking out loans without the proposed protections.[63]

Contrary to the NPRM's misinterpretation, the CFPB's 2017 Final Rule did not require consumers to have a "specific understanding" of risks. Instead, it clearly and unequivocally interpreted the standard to require that "consumers have reason generally to anticipate the likelihood and severity of the injury."[64] Thus, the 2017 Final Rule already interpreted the unfairness standard to mean that injury is not reasonably avoidable unless consumers are "generally" aware of the risks of injury.[65] The analysis and supporting factual information in the 2017 Final Rule lead to the conclusion that without the proposed protections, consumers are not generally aware of the risks of injury.[66]

The agency's ruling that the injury is not reasonably avoidable is also not justified by facts in the rulemaking record. The CFPB in the NPRM ignored the extensive evidence supporting the 2017 Final Rule determination regarding avoidability. The CFPB in the NPRM questioned the findings of the Mann Study and stated that its limited data was not sufficient and robust enough to make a general finding about a consumer's ability to anticipate injuries. However, even if this assertion were true (it is not), the NPRM relies on it exclusively to suggest that payday borrowers "expected some repeated sequences of loans."[67] This position ignores that the Final Rule analyzed a multitude of other studies and sources of evidence—such as the Pew Study and research by Rob Levy and Joshua Sludge—to evaluate consumer decision-making and determine that the noted injuries are unavoidable. A conclusion resting on such cursory and selective analysis underscores that the CFPB's determination is not justified by facts in the

[62] *See* NPRM at 278.
[63] *Id.*
[64] 82 Fed. Reg. 544721.
[65] *See 2017 Final Rule*, *supra* note 1, at 54956 (specifically noting the standard when the CFPB stated that it "Interprets this criterion to mean that unless consumers have reason generally to anticipate the likelihood and severity of the injury, and the practical means to avoid it, the injury is not reasonably avoidable").
[66] *See 2017 Final Rule*, *supra* note 1, at 54588.
[67] NPRM at 71, 48-54.

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rulemaking record, and is therefore arbitrary and capricious in violation of the law.

Moreover, nowhere in the NPRM does the CFPB provide new evidence contradicting its original avoidability finding. Yet, there is ample evidence (including the foregoing) that reinforces the CFPB's original findings that consumers cannot reasonably anticipate the likelihood and severity of the injuries caused by covered loans.

As the 2017 Final Rule concludes, many consumers "do not anticipate the likelihood and severity of the consequences of being unable to repay a loan that is unaffordable according to its terms" and many consumers do not understand or perceive the risk that the abovementioned harms will occur. [68] Longer-term borrowers cannot accurately estimate the consequences, including the total cost and the length of borrowing time to take out such loans.[69] Payday and title lenders tailor their advertisements to appeal to overly optimistic and impatient borrowers; research indicates that typical borrowers are, by and large, overly optimistic and impatient.[70] Many covered loans are advertised as short-term solutions for unexpected expenses such as a medical emergency or a car repair even though the payday lending model "depends upon heavy usage—often renewals by borrowers who are unable to repay upon their next payday— for its profitability" and covered loans are renewed on continual, longer-term basis (on average, seven times for payday loans, and eight times for vehicle title loans).[71]

Furthermore, studies have indicated that borrowers of covered loans may not understand the loan terms and the risks of prolonged indebtedness associated with taking out a covered loan, because borrowers may have chosen payday loans based on incomplete or miscomprehended information and many lenders do not comply with certain state disclosure regulations.[72]

This dynamic is particularly concerning in communities of color that, as discussed above in Section I, have been targeted by lenders and are vulnerable

[68] *See 2017 Final Rule*, *supra* note 1, at 5494, 5497; *see also Bates White Report*, *supra* note 9, at 11-18.

[69] *See 2017 Final Rule*, *supra* note 1, at 5497.

[70] *See Bates White Report*, *supra* note 9, at 22.

[71] The Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why* (July 2012), https://www.pewtrusts.org/en/research-and-analysis/reports/2012/07/19/who-borrows-where-they-borrow-and-why.

[72] *See Bates White Report*, *supra* note 9, at 22 (citing a study finding that approximately 20% - 30% of payday websites and 10% - 40% of storefront payday advertisements do not comply with those regulations).

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due to a lack of access to traditional financial services. Members of these communities are certainly among those consumers noted by the CFPB "who take out payday or single-payment vehicle title loans" after they "typically have tried and failed to obtain other forms of credit before turning to these covered loans as a last resort" and thus "based on their prior negative experience with attempting to obtain credit, [] may reasonably perceive that alternative options would not be available."[73] Compounding this vulnerability, certain populations of color display the lowest level of financial literacy among racial and ethnic groups.[74] Individuals who have less financial literacy are less likely to accumulate wealth and make long-term plans.[75] These communities are particularly at risk for falling into debt-traps caused by taking out covered loans.

d. The substantial injuries caused by covered loans without Underwriting Requirements are not outweighed by countervailing benefits to consumers or to competition

The practice of making payday, single-payment vehicle title, and other covered loans without reasonably assessing that the consumer will have the ability to repay the loan according to its terms is also unfair because the injuries of taking out such loans noted above are not outweighed by countervailing benefits.[76] In fact, studies show that consumers of covered loans without Underwriting Requirements find less harmful alternatives in their absence. In addition to the exhaustive analysis performed by the CFPB in the 2017 Final Rule, a more recent report by the National Consumer Law Center shows that the benefits of imposing these protections far outweigh any harm. The report found that "[c]onsumers are better off without payday loans and find better ways to cope with financial challenges."[77] Furthermore, "[f]ormer borrowers generally agree that they are better off without payday loans and express relief that the loans are no longer available."[78] The study also found that in the absence of payday loans "people use a variety of strategies to manage their finances, including borrowing from family and friends, negotiating payment plans with utility companies, and using pawn shops or traditional credit products like credit cards."[79] Finally, "consumers do

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[73] *See 2017 Final Rule*, *supra* note 1, at 54595.
[74] *See Bates White Report*, *supra* note 9, at 22.
[75] *Id.*
[76] *See 2017 Final Rule*, *supra* note 1, at 54602.
[77] National Consumer Law Center, *After Payday Loans: How do Consumers Fare When States Restrict High-Cost Loans?*, (Oct. 2018), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/ib_how-consumers-fare-restrict-high-cost-loans-oct2018.pdf (not cited in 2017 Final Rule).
[78] *Id.*
[79] *Id.*

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not turn to illegal internet loans in large numbers."[80]

Several states make payday loans illegal because harms (or risk of harms) outweigh any potential benefits. In fact, state regulations banning payday loans generally help consumers, saving consumers more than $2.2 billion annually in fees that would otherwise be paid to payday lenders.[81]

IV. The NPRM ignored and/or misconstrued facts in the rulemaking record that supported the CFPB's conclusion that payday lending is "abusive".

a. Legal Standard for Abusive Practices

An act or practice is abusive if it: "(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 of 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."[82]

b. Covered loans materially interfere with consumers' ability to understand the terms or conditions of the loans

The NPRM disregarded the facts and circumstances underlying the original abusiveness finding and was not justified by the facts in the rulemaking record. The proposed rule takes issue with the 2017 Final Rule's findings of abusiveness based on the application of the "lack of consumer understanding" prong of abusiveness and the application of the "taking unreasonable advantage" element of abusiveness.[83] Like its objections to the 2017 Final Rule's application of the unfairness standard, the CFPB argues that it lacks a sufficient evidentiary basis that payday lenders take unreasonable advantage of consumers such that their practices are abusive.[84] The proposed rule, however, ignores the extensive

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[80] *Id.*

[81] Robin Howarth, Delvin Davis, and Sarah Wolff, *Shark-Free Waters: States are Better Off without Payday Lending*, Center for Responsible Lending (Sept. 2017), http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_shark_free_waters_aug2016.pdf (not cited in 2017 Final Rule).

[82] 12 U.S.C. § 5531(d).

[83] NPRM at 91.

[84] NPRM at 90–91.

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rulemaking record reflecting the CFPB's consideration of this issue.[85] The proposed rule also challenges the CFPB's interpretation of the standard for abusiveness against a backdrop of scant legal precedent while overlooking the case law that specifically contemplates the standard used by the CFPB in the 2017 Final Rule.[86]

Furthermore, the additional evidentiary research noted above from the Bates White Report lends further support to the CFBP's original findings that covered loans' without the Underwriting Requirements materially interfere with a consumers' ability to understand the terms and conditions of the loans and take unreasonable advantage of consumers. It also underscores that the CFPB's disregard of these facts is unreasonable.

Like it did for the "unreasonableness" standard, the CFPB uses a "strawman" argument to claim that it wrongly interpreted "understand" in the 2017 Final Rule to require that consumers have a "specific understanding" of their personal risks associated with covered loans.[87] The CFPB is now changing course, by suggesting that this prong is satisfied if consumers "appreciate the *general* risks of harm associated with the products sufficient for them to consider taking reasonable steps to avoid that harm."[88] However, the CFPB already used this standard in the 2017 Final Rule and did not apply a broader standard as it claims in the NPRM. Therefore its ruling in the 2017 Final Rule used the correct standard which was supported by substantial information on the record.

Furthermore, the same evidence discussed above that supported the 2017 Final Rule conclusion that injuries caused by covered loans are not "reasonably avoidable" without Underwriting Requirements also supports that covered loans without those protections materially interfere with the ability of a consumer to understand a term or condition of such loans.

V. The CFPB failed to properly analyze the impact of the rollback pursuant to the Small Business Regulatory Enforcement Fairness Act ("SBREFA")

The SBREFA requires the CFPB to assure that small entities have been given an opportunity to participate in proposed agency regulations that are likely

[85] *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472, 54614–54624.
[86] *See, e.g.*, *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 904-06 (S.D. Ind. 2015)
[87] NPRM at 86
[88] NPRM at 86.

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to have a "significant economic impact on a substantial number of small entities."[89] It requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis ("IRFA") which describes the impact of the proposed rule on small entities.[90] The IRFA or a summary must be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule.[91]

"Covered agencies", including the CFPB, have additional responsibilities to ensure that representatives of small entities provide comment "prior to publication"[92] of the IRFA. Specifically, the SBREFA requires the CFPB to notify the Chief Counsel for the U.S. Small Business Administration's ("SBA") Office of Advocacy so that the Chief Counsel can convene a review panel consisting of agency officials responsible for implementing the proposed rule ("Review Panel"). The Review Panel is required to review the IRFA and collect advice and recommendations from affected small entity representatives.[93] Based on this feedback, the agency must modify the proposed rule, the IRFA or the decision on whether an initial regulatory flexibility analysis is required.[94]

The RFA exempts an agency from the requirement to publish an IRFA and convene a Review Panel if the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities[,]" and publishes the certification in the Federal Register at the time of publication of the general NPRM for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification.[95]

In the case *N. Carolina Fisheries Ass'n, Inc. v. Daley,* the court noted that this certification must provide a factual basis in its explanation of whether there will be no impact.[96] The court found that while the agency "cannot be expected to explore every possible contingency before certifying that there is no significant impact, the government must make some showing that it has at least considered the potential effects of a rule."[97] This case stemmed from a certification of no significant impact only because a proposed quota, remained the same from 1996

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[89] 5 U.S.C. § 602 (a)(1) and 5 U.S.C. § 609 (a).
[90] *Id.* § 603 (a).
[91] *Id.*
[92] *Id.* § 609 (b).
[93] *Id.* §§ 603 (d)(2) and 609 (b)(1)-(5).
[94] *Id.* § 609 (b)(6).
[95] *Id.* § 605 (b).
[96] *N. Carolina Fisheries Ass'n, Inc. v. Daley,* 16 F. Supp. 2d 647, 652 (E.D. Va. 1997).
[97] *Id*.

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to 1997. The Court found the government only provided a "conclusory statement that, because the quota was the same in 1997 as it was in 1996, there would be no significant impact," which was not a sufficient analysis.[98]

Here, the CFPB violated the SBREFA by improperly certifying that the proposed rescission would not have a significant economic impact on a substantial number of small entities in order to circumvent the processes imposed by Congress. The CFPB's sparse statement of facts supporting its certification focuses on the three justifications noted below which are exemplary of cursory conclusions not supported by factual information like those rejected by the court in *N. Carolina Fisheries Ass'n*.

The CFPB specifically noted that 1) if adopted, this proposal would reduce the costs and burdens on covered persons, including small entities, relative to a baseline where compliance with the 2017 Final Rule becomes mandatory; 2) the 2017 Final Rule's FRFA discussion of the specific costs and burdens imposed by the 2017 Final Rule on small entities, including those imposed by the Mandatory Underwriting Requirements that this proposal would reverse; and 3) No new compliance action would be needed because small entities that are in compliance with the law at such time when this proposal might be adopted would not need to take any additional action to remain in compliance.

The CFPB's conclusions are based on the incorrect presumption that the only economic impact of a rollback to small entities would be through the removal of costs and burdens arising from any new compliance requirements.[99] The CFPB's conclusory certification statements thus fail to address that rescission of the rule would harm small businesses who stood to *benefit* from the 2017 Final Rule. Significant economic impact is not a one-way street; it can be either a cost or a benefit.

Providers of covered loans are not the only small businesses in this ecosystem. There are also many other types of community banks, credit unions, and other small businesses that do not engage in predatory lending.[100] The Final Rule's curb on the unfair and abusive practices of predatory small lenders will

[98] *Id.* at 652-53.
[99] *See* NPRM at 394.
[100] *See* Federal Deposit Insurance Corporation, *FDIC Quarterly*, i (Mar. 28, 2019) (Community banks represent 92% of FDIC-insured institutions), https://www.fdic.gov/bank/analytical/quarterly/2019-vol13-1/fdic-v13n1-4q2018.pdf; *see also Lower E. Side People's Fed. Credit Union v. Trump et al*, No. 17-09536 (S.D.N.Y. filed Dec. 5, 2017) (small non-predatory lender claiming Leandra Englishas the rightful director of the CFPB) (not cited in 2017 Final Rule).

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benefit other non-predatory small lenders competing in this market. The NPRM's rescission of these protections will commensurately harm these small businesses. The CFPB has an obligation under SBREFA to evaluate these impacts.

The Final Rule, and its rescission, will also impact small business borrowers—especially minority-owned small businesses[101], given the prevalence of payday lenders in communities of color. By curtailing covered loans' unfair and abusive practices, small business borrowers will have greater protections and better loan terms. That will enable them to direct their limited resources toward their business instead of predatory lenders.

In addition, one of the primary claims in the NPRM is that it will significantly impact small businesses and lenders, opening up access to credit and dramatically increasing revenue. That is a significant impact on small businesses that the CFPB entirely failed to analyze. If the CFPB is going to argue that the NPRM will benefit small businesses, it has to conduct the appropriate SBREFA process to support that claim.

VI. Conclusion

For the foregoing reasons, the Lawyers' Committee strongly urges the CFPB to reconsider its proposed rollback of the 2017 Final Rule. The proposal fails to provide a reasoned explanation for disregarding the facts and circumstances that underlie the prior policy.

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[101] *See* U.S. Small Business Administration, Office of Advocacy, *2018 Small Business Profile*, 2 (2018) (There are approximately 8 million minority-owned small businesses in the United States), https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf (not cited in 2017 Final Rule).