



Summary of CFPB Notices of Proposed Rulemaking (NPRMs)

I. Overview

On February 6, 2019, the Consumer Financial Protection Bureau (CFPB) issued its long-awaited new rule proposal to rescind a large portion of its 2017 Final Rule for small dollar lending. In this much-anticipated rulemaking, which takes the form of two separate Notice of Proposed Rulemakings (NPRMs), the CFPB proposed to rescind the mandatory underwriting/ability-to-repay provisions of the 2017 Final Rule that had been promulgated during the tenure of former Director Richard Cordray. Each of these two CFPB rulemakings were published in the *Federal Register* on February 14.

The [“Reconsideration NPRM”](#) proposes to rescind in full the ability-to-repay provisions of the 2017 Final Rule. This NPRM has a 90-day comment period, thus making for a May 15 deadline for receiving public comments. This NPRM, however, does not propose any changes to the payments provisions of the 2017 Final Rule.

The CFPB’s second rule proposal, the [“Compliance Date Delay NPRM,”](#) seeks comments on whether it should delay the compliance date for the mandatory underwriting provisions of the 2017 Final Rule from August 19, 2019, to November 19, 2020. The Compliance Delay NPRM, which has a 30-day comment period, has a deadline of March 18 for public comments.

It is important to note that neither NPRM proposes any changes to the payments provisions of the 2017 Final Rule.

II. [The Reconsideration NPRM](#)

- If adopted, the Reconsideration NPRM would rescind the ability-to-repay provisions, also known as the “Mandatory Underwriting Provisions,” of the 2017 Final Rule in their entirety.
- Includes rescission of provisions that:
 - Provide that it is an unfair and abusive practice for a lender to make a covered short-term or longer-term balloon-payment loan without reasonably determining that consumers have the ability to repay those loans according to their terms;
 - Prescribe mandatory underwriting requirements for making the ability-to-repay determination;
 - Exempt certain loans from the underwriting requirements; and
 - Establish related definitions, reporting, and recordkeeping requirements.

- The core provisions are contained in Subpart B (sections 1041.4 to 1041.6) of the 2017 Rule.
- The provisions to be rescinded include the usage restrictions on covered loans, such as the 30-day cooling off period after a third loan in a sequence.
- All provisions relating to registered information services (RIS) would also be rescinded.
- The Reconsideration NPRM provides several different justifications for rescission:
 - Given the “dramatic” market impacts of the 2017 Rule, the Bureau “believes it is prudent as a policy matter to require a more robust and reliable evidentiary basis to support key findings” justifying the rule. The evidence cited in support of the 2017 Rule fails to meet this standard.
 - Cites preliminary conclusions that both the Mann Study and the Pew Study were not sufficiently robust and a reliable basis for the Bureau’s previous findings.
 - The Mann study on consumer expectations, which was the “linchpin” for several key findings about consumer understanding of risk, is not sufficiently robust and reliable.
 - The Mann study involved a single payday lender operating in just five states, and may not be representative of other lenders or other states.
 - Two industry-sponsored surveys cast doubt on the Bureau’s interpretation of the Mann study’s findings.
 - The Pew study, which was used to support the finding that consumers lack the ability to protect themselves, likewise is not sufficiently robust and reliable.
 - The Pew study asked respondents about their feelings about payday loans, not about their actual borrowing decisions.
 - The Pew study contains other findings that cast doubt on the Bureau’s finding that payday borrowers lack the ability to explore available alternatives.
 - Other research likewise casts doubt on the Pew study’s findings.
 - Separately, in the 2017 Rule, the Bureau misconstrued its UDAAP authority in several ways. This is an “independent” conclusion that justifies repeal of the ability-to-repay provisions “even if” the evidence discussed above were sufficiently robust and reliable.
 - The Bureau should not have interpreted the “reasonably avoidable” prong of the unfairness standard to require a borrower to have a specific understanding of their individualized risk, as measured by the borrower’s ability to accurately predict how long he or she would be in debt. Rather, the statute requires only that borrowers have a general understanding of the likelihood and magnitude of the risks.

- For similar reasons, the Bureau misconstrued and misapplied the “lack of consumer understanding” prong of the abusiveness standard.
 - The Bureau also misconstrued the “countervailing benefits” prong of the unfairness standard by taking into account the Bureau-created conditional exemption and by undervaluing other benefits of payday lending.
 - Finally, the Bureau misconstrued the “taking unreasonable advantage” element of the abusiveness standard by considering various factors (including atypicality of lending practices and consumers’ lack of understanding of company business models) that do not constitute unreasonable advantage-taking.
- The Bureau also conducted a cost-benefit analysis as required by the statute.
- The repeal would take effect 60 days after publication of a final rule in the *Federal Register*.
- **COMMENT DEADLINE of MAY 15, 2019, which is 90 days after the (Feb. 14) publication in *Federal Register*.**
- **Table of Contents:** As part of the initial release, the CFPB also issued a table of contents its Reconsideration NPRM.
- **Redline Version:** CFPB also released an unofficial, informal redline to assist industry and other stakeholders in reviewing the changes that this proposal would make to the regulatory text and commentary of the 2017 Final Rule.

III. **The Compliance Date Delay NPRM**

- The Compliance Date Delay NPRM proposes to extend the compliance date for the ability-to-repay provisions of the 2017 Rule by fifteen months, to November 19, 2020.
- The Bureau notes that a delay in the compliance date is justified to allow lenders to avoid compliance with provisions that may be rescinded as part of the Reconsideration NPRM.
- Extension of the compliance date is also justified by unanticipated potential obstacles to compliance with the ability-to-repay provisions by August 19, 2019, including recently enacted state laws and the failure of third-party software vendors to produce necessary software components on schedule.
- Any final rule would be published and become effective prior to the existing compliance date of August 19, 2019.
- **COMMENT DEADLINE OF MARCH 18, 2019, which is 30 days after the (Feb. 14) publication in *Federal Register*.**

IV. Payments Provisions

- Neither NPRM proposes changes to the payments provisions contained in Subpart C (sections 1041.7 to 1041.9) of the 2017 Rule.
 - Thus, both the substantive payments provisions and the August 19, 2019, compliance date for those provisions would be left in place for now.

- However, the August 2019 compliance date remains stayed by the court in the Texas litigation until further order of the court. The parties are required to submit a joint status report on March 1, at which time the Bureau may state its position on whether the court-ordered stay should remain in effect with respect to the payments provisions.
 - It is possible the court will seek further briefing on whether to maintain the stay of the payments provisions.

- The Bureau noted in each NPRM that it “intends to examine” criticisms of the payments provisions received from stakeholders, and “if the Bureau determines that further action is warranted, the Bureau will commence a separate rulemaking initiative (such as by issuing a request for information or an advance notice of proposed rulemaking).”
 - The Bureau did not suggest any timetable for these steps.