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# Payday, Vehicle Title, and High-Cost Installment Lending Rule: Payment- Related Requirements

Small Entity Compliance Guide

# Version Log

The Bureau updates this guide on a periodic basis. Below is a version log noting the history of this document:

| Date          | Version | Summary of Changes  |
|---------------|---------|---|
| June 2019     | 2.0     | <p>Updated to address the delay of the mandatory underwriting provisions and the technical corrections set forth in the final rule released on June 6, 2019 (Delay Final Rule), including:</p> <ul style="list-style-type: none"><li>• Revisions to the introduction to include the Delay Final Rule (Section 1);</li><li>• Revisions to account for the delayed compliance date for the mandatory underwriting provisions and the addition of new 12 CFR 1041.15 (Section 1.2.2);</li><li>• Deletion of footnote regarding proposed technical corrections because those changes were adopted in the Delay Final Rule (Section 2.5.1);</li><li>• Revision of the Bureau’s web address to be included in Consumer Rights Notice and deletion of footnote regarding proposed technical corrections because those changes were adopted in the Delay Final Rule (Section 5.4); and</li><li>• Revision of footnote to account for the delayed compliance date for the mandatory underwriting provisions (Section 6.2).</li></ul> <p>Updated to reflect miscellaneous administrative changes.</p> |
| February 2019 | 1.0     | Original Version  |

# Table of contents

|  |           |
|--|-----------|
| <b>1. Introduction .....</b>   | <b>1</b>  |
| 1.1 Scope and focus of this guide.....   | 2         |
| 1.2 Brief summary of Payday Lending Rule’s payment-related requirements, effective date, and compliance date ..... | 3         |
| 1.3 Use of examples in this guide .....  | 5         |
| 1.4 Additional implementation resources.....   | 5         |
| <b>2. Covered loans .....</b>  | <b>7</b>  |
| 2.1 Covered short-term loans .....   | 8         |
| 2.2 Covered longer-term balloon-payment loans.....   | 10        |
| 2.3 Covered longer-term loans .....  | 12        |
| 2.4 Exclusions from coverage.....  | 17        |
| 2.5 Conditional exemptions .....   | 20        |
| <b>3. Lenders and service providers under the Payday Lending Rule.....</b>   | <b>26</b> |
| 3.1 Lenders .....  | 26        |
| 3.2 Service providers .....  | 27        |
| <b>4. Prohibited payment transfer attempts .....</b>   | <b>29</b> |
| 4.1 Payment transfers .....  | 30        |
| 4.2 Conditional exclusion for certain transfers made by an account-holding institution.....                        | 32        |
| 4.3 Prohibition on making certain payment transfers .....  | 33        |
| 4.4 Exception for additional payment transfers authorized by the consumer in a new and specific authorization..... | 36        |
| 4.5 Single immediate payment transfers at the consumer’s request .....   | 40        |

|           |   |           |
|-----------|---|-----------|
| 4.6       | Prohibition on evasion.....                             | 41        |
| <b>5.</b> | <b>Disclosure of payment transfer attempts .....</b>    | <b>43</b> |
| 5.1       | General form and delivery requirements for notices..... | 44        |
| 5.2       | First payment withdrawal notices.....                   | 47        |
| 5.3       | Unusual payment withdrawal notices.....                 | 51        |
| 5.4       | Consumer rights notices.....                            | 55        |
| 5.5       | Electronic short notices .....                          | 57        |
| <b>6.</b> | <b>Compliance program and record retention .....</b>    | <b>60</b> |
| 6.1       | Compliance program .....                                | 60        |
| 6.2       | Record retention .....                                  | 60        |
| 6.3       | Prohibition on evasion.....                             | 62        |

# 1. Introduction

On October 5, 2017, the Consumer Financial Protection Bureau (Bureau) issued a final rule governing certain personal loans with short-term or balloon-payment structures and certain additional installment loan products (2017 Payday Lending Rule). On February 6, 2019, the Bureau issued: (1) a notice of proposed rulemaking to reconsider the 2017 Payday Lending Rule’s mandatory underwriting provisions;<sup>1</sup> and (2) a notice of proposed rulemaking to delay the August 19, 2019 compliance date of the mandatory underwriting provisions.<sup>2</sup> On June 6, 2019, the Bureau issued a final rule (Delay Final Rule)<sup>3</sup> finalizing the second of these two proposals. The Delay Final Rule delays the August 19, 2019 compliance date for the 2017 Payday Lending Rule’s mandatory underwriting provisions to November 19, 2020 and makes technical corrections to the 2017 Payday Lending Rule.

This guide uses the term “Payday Lending Rule” or “Rule” to refer to the 2017 Payday Lending Rule as amended by the Delay Final Rule.

The proposed rulemaking does not reconsider the payment-related requirements of the Payday Lending Rule. Thus, this guide highlights information that may be helpful when implementing the payment-related requirements of the Payday Lending Rule. It does not discuss the Rule’s mandatory underwriting provisions. As appropriate, the Bureau will revise this guide to assist

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<sup>1</sup> 84 Fed. Reg. 4252 (Feb. 14, 2019).

<sup>2</sup> 84 Fed. Reg. 4298 (Feb. 14, 2019).

<sup>3</sup> 84 Fed. Reg. 27907 (June 17, 2019).

industry with implementation of the Payday Lending Rule's mandatory underwriting provisions at a later date.

This guide meets the requirements of Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 with regard to the Payday Lending Rule's payment-related requirements.

**This guide is not a substitute for reviewing the Payday Lending Rule.** The Payday Lending Rule and its Official Interpretations (also known as the commentary) are the definitive sources of information regarding the Payday Lending Rule's requirements. The Payday Lending Rule is available on the Bureau's website at <http://www.consumerfinance.gov/policy-compliance/guidance/payday-lending-rule>.

## 1.1 Scope and focus of this guide

This guide focuses on the payment provisions of the Payday Lending Rule, which are found in Subpart C of the Rule. This guide also summarizes the Rule's general (*i.e.*, coverage) provisions as well as its record retention and compliance program requirements as they relate to the payment provisions. The general provisions are found in Subpart A of the Rule, and the record retention and compliance program requirements are found in Subpart D of the Rule.

Except when specifically needed to explain these provisions of the Payday Lending Rule, this guide does not discuss other laws, regulations, or regulatory guidance that may apply.

Users of this guide should review the Payday Lending Rule as well as this guide.

The content of this guide does not include any rules, bulletins, guidance, or other interpretations issued or released after the date on the guide's cover page.

## 1.2 Brief summary of Payday Lending Rule’s payment-related requirements, effective date, and compliance date

### 1.2.1 Brief summary of the Payday Lending Rule’s payment-related requirements

A “lender” is defined in the Payday Lending Rule as a person that regularly extends credit to consumers primarily for personal, family, or household purposes. The Rule applies to lenders that make “covered loans” as that term is defined in the Rule. Generally, covered loans include:

1. Covered short-term loans that require repayment within 45 days of consummation or an advance. Such loans are covered loans regardless of the cost of credit;
2. Covered longer-term loans that have certain types of balloon-payment structures. These loans are also covered loans regardless of the cost of credit; and
3. Covered longer-term loans that have a cost of credit exceeding a 36 annual percentage rate (APR) and that have a leveraged payment mechanism giving the lender the right to initiate transfers from the consumer’s account without further action by the consumer.<sup>4</sup>

Certain accommodation loans and alternative loans that generally conform to the National Credit Union Administration’s (NCUA’s) requirements for the Payday Alternative Loan (PAL) program are exempted from being covered loans. Eight other types of loans are excluded from being covered loans. For example, perfected mortgage loans, purchase money security interest

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<sup>4</sup> As discussed in Section 2.3, a leveraged payment mechanism does not include initiating a single immediate payment transfer (*i.e.*, a one-time transfer initiated within one business day after the consumer proffers a check or authorizes an electronic transfer).

loans, credit card accounts, and certain overdraft services and overdraft lines of credit are not covered loans.

The Payday Lending Rule's payment provisions impose two types of requirements regarding lenders' repeated attempts to withdraw payments from consumers' accounts after prior attempts have failed due to insufficient funds.

First, where two consecutive withdrawal attempts have failed due to insufficient funds, the Rule prohibits a lender from attempting another withdrawal from the same account unless the lender obtains the consumer's new and specific authorization to make further withdrawals from the account. This prohibition on further withdrawal attempts applies whether the two failed attempts are initiated through a single payment channel or different channels, such as the automated clearinghouse (ACH) system or the check network. These requirements do not apply to a lender's withdrawal attempts if the lender is the institution that holds the consumer's account and the lender meets certain conditions.

Second, a lender is required to provide a written notice before its first attempt to withdraw payment for a covered loan from a consumer's account and before subsequent attempts that deviate from scheduled amounts or dates or that involve a different payment channel than the prior attempt. The Rule also requires a lender to provide a consumer rights notice if two consecutive attempts to withdraw payment have failed due to insufficient funds in a consumer's account. The Rule details the information that must be included in the notices and how they can be provided, including permissible methods of electronic delivery. The Rule's notice requirements do not apply to a lender's withdrawal attempts if the lender is the institution that holds the consumer's account and the lender meets certain conditions

A lender making a covered loan must develop and follow written policies and procedures designed to ensure compliance with the Payday Lending Rule. Lenders must also retain evidence of compliance for 36 months. The Rule outlines the types and format of information that lenders must retain.



## 1.2.2 Effective date and compliance date of the Payday Lending Rule

The Payday Lending Rule became effective on January 16, 2018. However, the Rule's compliance date for the payment-related requirements is August 19, 2019.<sup>5</sup> Thus, by its terms, the Rule does not require lenders to comply with the Rule's payment-related requirements until August 19, 2019. See 12 CFR 1041.15. The compliance date, however, is currently stayed pursuant to a court order issued in *Community Financial Services Association v. CFPB*, No. 1:18-cv-00295 (W.D. Tex. Nov. 6, 2018). As a result, lenders have no obligation to comply with the Rule until the court-ordered stay is lifted.

## 1.3 Use of examples in this guide

This guide has examples to illustrate some portions of the Payday Lending Rule. The examples do not include all possible factual situations that could illustrate a particular provision, trigger a particular obligation, or satisfy a particular requirement.

## 1.4 Additional implementation resources

Additional resources to help industry understand and comply with the Payday Lending Rule are available on the Bureau's website at <http://www.consumerfinance.gov/policy-compliance/guidance/payday-lending-rule>. You may also sign up on this website for an email distribution list that the Bureau will use to announce additional resources as they become available.

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<sup>5</sup> The Payday Lending Rule's compliance date for the following provisions is delayed until November 19, 2020: 12 CFR 1041.4 through 1041.6, 1041.10, and 1041.12(b)(1) through (3). Thus, by its terms, the Rule does not require lenders to comply with these provisions of the Rule until November 19, 2020. The compliance date, however, is currently stayed pursuant to a court order issued in *Community Financial Services Association v. CFPB*, No. 1:18-cv-00295 (W.D. Tex. Nov. 6, 2018). As a result, lenders have no obligation to comply with the Rule until the court-ordered stay is lifted. Additionally, the Bureau has issued a notice of proposed rulemaking to reconsider the Rule's mandatory underwriting provisions, which include the provisions that are delayed as well as 12 CFR 1041.11. 84 Fed. Reg. 4252 (Feb. 14, 2019).

If you have a specific regulatory interpretation question about the Payday Lending Rule after reviewing these resources, you can submit the question to the Bureau on its website at <http://reginquiries.consumerfinance.gov>. You may also leave your question in a voicemail at 202-435-7700.

Bureau staff provides only informal responses to regulatory inquiries, and the responses do not constitute official interpretations or legal advice. Bureau staff is not able to respond to specific inquiries within a particular requested timeframe. Actual response times will vary based on the number of questions Bureau staff is handling and the amount of research needed to respond to a specific question.

## 2. Covered loans

The Payday Lending Rule applies to “covered loans” made by a “lender,” as those terms are defined in the Rule. This Section 2 discusses how to determine whether a loan is a “covered loan.” Section 3 discusses who is a lender under the Payday Lending Rule.

The Payday Lending Rule applies to three types of loans extended to a consumer for personal, family, or household purposes. The Rule and this guide collectively refer to these three types of loans as “covered loans.” The criteria for each type of covered loan are discussed in more detail, below, but generally the three types of covered loans are:

1. Covered short-term loans that require repayment within 45 days of consummation or an advance. Such loans are covered loans regardless of the cost of credit;
2. Covered longer-term loans that have certain types of balloon-payment structures. These loans are also covered loans regardless of the cost of credit; and
3. Covered longer-term loans that have a cost of credit exceeding a 36 annual percentage rate (APR) and that have a leveraged payment mechanism giving the lender the right to initiate transfers from the consumer’s account without further action by the consumer.<sup>6</sup>

Certain types of loans are excluded or exempted from the Payday Lending Rule.

As outlined in Section 2.4, the Payday Lending Rule excludes eight categories of loans from the definition of covered loan, including perfected mortgage loans, purchase money security interest loans, credit card accounts, and certain overdraft services and overdraft lines of credit.

As outlined in Section 2.5, the Payday Lending Rule exempts two categories of otherwise covered loans:

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<sup>6</sup> As discussed in Section 2.3, a leveraged payment mechanism does not include initiating a single immediate payment transfer (*i.e.*, a one-time transfer initiated immediately after the consumer proffers a check or authorizes an electronic transfer).

1. Alternative loans, which are loans that generally conform to the NCUA’s requirements for the PAL program regardless of whether the lender is a federally insured credit union; and
2. Accommodation loans, provided the lender together with its affiliates do not originate more than 2500 covered loans in a calendar year and did not derive more than 10 percent of their receipts from covered loans during the previous tax year.

## 2.1 Covered short-term loans

A loan is a covered short-term loan if it meets all of the following:

1. *Is an extension of credit to a consumer (i.e., an individual or an individual’s agent or trustee).* Transactions that do not constitute credit are not subject to the Payday Lending Rule.
2. *Is extended primarily for personal, family, or household purposes.* Lenders may rely on Regulation Z, 12 CFR 1026.3(a) and its related commentary, when determining the primary purpose of a loan. Comment 1041.3(b)-2.
3. *Requires a consumer to repay substantially the entire amount of the loan within 45 days of consummation or to repay substantially the entire amount of any advance within 45 days of the advance, as applicable.*

For closed-end credit that provides for a single advance, this criteria is satisfied if the consumer is required to repay a substantial majority of the loan within 45 days of consummation. For all other loans (i.e., open-end credit and closed-end credit that provides for multiple advances), this criteria is

☐ For purposes of the Payday Lending Rule, open-end credit is an extension of credit to an individual or an individual’s agent, trustee, or representative that is open-end credit as defined in Regulation Z, 12 CFR 1026.2(a)(20), but without regard to whether the credit is consumer credit under Regulation Z, is extended by a creditor as defined in Regulation Z, is extended to a consumer as defined in Regulation Z, or permits a finance charge to be imposed from time to time on an outstanding balance as defined in Regulation Z. 12 CFR 1041.2(a)(16); comment 1041.2(a)(16)-1. For purposes of the Rule, closed-end credit is an extension of credit to an individual or an individual’s agent, trustee, or representative that is not open-end credit. 12 CFR 1041.2(a)(3); comment 1041.2(a)(3)-1.

satisfied if the consumer is required to repay a substantial majority of any advance within 45 of the advance.

The determination of whether a loan is substantially repayable within 45 days depends on the facts and circumstances, including the timing and size of scheduled payments. Comment 1041.3(b)(1)-3. For example, a loan is substantially repayable within 45 days if the lender has the right to be repaid through a sweep or withdrawal of any qualifying electronic deposit made into a consumer’s account within 45 days of consummation or an advance (as applicable), even if no qualifying electronic deposit is actually made. Comment

1041.3(b)(1)-4.

A loan is not substantially repayable within 45 days merely because a consumer chooses to repay within 45 days if the loan terms do not require the consumer to do so. Comment 1041.3(b)(1)-3. However, if under any applicable law, a consumer would breach the loan agreement by not substantially repaying the entire amount of the loan within 45 days of consummation or to repay a substantial majority of any advance within 45 of the advance (as applicable), the loan is substantially repayable within 45 days. Comment 1041.3(b)(1)-5.

☞ “Consummation” is the time that the consumer becomes contractually obligated on a new loan or on a modification that increases the amount of an existing loan. 12 CFR 1041.2(a)(5). When a consumer becomes contractually obligated is a matter to be determined by applicable law, such as state or local law. Consummation does not occur merely because the consumer has made some financial investment in the transaction (*e.g.*, paid a non-refundable fee), unless applicable law holds otherwise. Comment 1041.2(a)(5)-1.

4. *Does not satisfy an exclusion set forth in the Payday Lending Rule.* Section 2.4 discusses exclusions under the Payday Lending Rule.
5. *Does not satisfy a conditional exemption set forth in the Payday Lending Rule.* Section 2.5 discusses conditional exemptions under the Payday Lending Rule.

12 CFR 1041.3(b)(1).

## 2.2 Covered longer-term balloon-payment loans

A loan is a covered longer-term balloon-payment loan if it meets all of the following, as applicable:

1. *Is not a covered short-term loan.* Section 2.1 discusses the criteria for covered short-term loans.
2. *Is an extension of credit to a consumer (i.e., an individual or an individual's agent or trustee).*
3. *Is extended primarily for personal, family, or household purposes.* Lenders may rely on Regulation Z, 12 CFR 1026.3(a) and its related commentary, when determining the primary purpose of a loan. Comment 1041.3(b)-2.
4. *For closed-end credit that provides for a single advance, satisfies either of the following conditions:*
  - a. *The consumer is required to repay the entire balance of the loan in a single payment more than 45 days after consummation; or*
  - b. *The consumer is required to repay the loan through at least one payment that is more than twice as large as any other payment(s).* All required payments due under the loan are used to determine whether a particular payment is more than twice as large as another payment, regardless of whether payments have changed during the loan term due to rate adjustments or other payment changes permitted or required under the loan. This includes required payments of principal (if any) and charges, except charges for actual unanticipated late payments, charges for exceeding the credit limit, and charges for delinquency, default, or a similar occurrence. Comments 1041.3(b)(2)-2 and -3. Sums that are accelerated and due upon default are excluded from the determination. Comment 1041.3(b)(2)-3.
5. *For open-end credit and closed-end credit that provides for multiple advances, satisfies any of the following conditions:*
  - a. *The consumer is required to repay substantially the entire amount of an advance in a single payment more than 45 days after the advance is made.*

- b. *The consumer is required to make at least one payment on an advance that is more than twice as large as any other payment(s).* All required payments due under the loan are used to determine whether a particular payment is more than twice as large as another payment, regardless of whether payments have changed during the loan term due to rate adjustments or other payment changes permitted or required under the loan. This includes required payments of principal (if any) and charges, except charges for actual unanticipated late payments, charges for exceeding the credit limit, and charges for delinquency, default, or a similar occurrence. Comments 1041.3(b)(2)-2 and -3. Sums that are accelerated and due upon default are excluded from the determination. Comment 1041.3(b)(2)-3.
- c. *The loan is structured such that paying the required payments may not fully amortize the outstanding balance by a specified date or time; AND the amount of the final payment to repay the outstanding balance at such time could be more than twice the amount of other minimum payments.*

**Example:** Willow Lender extends an open-end credit plan to a consumer primarily for personal, family, or household purposes. The plan has a \$500 credit limit, monthly billing cycles, and a monthly minimum payment that is equal to 10% of the outstanding principal. All outstanding amounts must be repaid within six months of the advance. Assume the fees and interest equal 10% of the outstanding principal, and that the outstanding principal remains the same if the consumer pays nothing other than the minimum payment amount. Unless an exclusion or conditional exemption applies, the loan is a covered longer-term balloon-payment loan because the sixth payment would be more than twice the amount of the minimum required payment if the consumer drew the entire amount at one time and made only minimum monthly payments.

6. *Does not satisfy an exclusion set forth in the Payday Lending Rule.* Section 2.4 discusses exclusions under the Payday Lending Rule.
7. *Does not satisfy a conditional exemption set forth in the Payday Lending Rule.* Section 2.5 discusses conditional exemptions under the Payday Lending Rule.

12 CFR 1041.3(b)(2)(i).

## 2.3 Covered longer-term loans

A loan is a covered longer-term loan if it meets all of the following, as applicable:

1. *Is not a covered short-term loan or a covered longer-term balloon loan.* Section 2.1 discusses the criteria for covered short-term loans, and Section 2.2 discusses the criteria for covered longer-term balloon-payment loans.
2. *Is an extension of credit to a consumer (i.e., individual or an individual's agent or trustee).*
3. *Is extended primarily for personal, family, or household purposes.* Lenders may rely on Regulation Z, 12 CFR 1026.3(a) and its related commentary, when determining the primary purpose of a loan. Comment 1041.3(b)-2.

4. *For closed-end credit, satisfies both of the following conditions:*

- a. *The cost of credit for the loan exceeds 36 percent per annum at the time of consummation.* “Cost of credit” means the cost of consumer credit expressed as a per annum rate. The cost of credit includes all finance charges as set forth in Regulation Z, 12 CFR 1026.4, but without regard to whether the credit is consumer credit or is extended to a consumer as those terms are defined in Regulation Z, 12 CFR 1026.2(a)(11) and (12). 12 CFR 1041.2(a)(6)(i).

☞ A loan is a covered longer-term loan only if it satisfies both the 36% cost of credit (i.e., APR) requirement and the leveraged payment mechanism requirement. For example, a 60-day loan is not a covered longer-term loan if the cost of credit as measured pursuant the Payday Lending Rule is less than or equal to a rate of 36%, even if the lender or service provider obtains a leveraged payment mechanism. Comment 1041.3(b)(3)-1.



For closed-end credit, the cost of credit must be calculated according to the requirements of Regulation Z, 12 CFR 1026.22. 12 CFR 1041.2(a)(6)(ii)(A). Under Regulation Z, the cost of credit is expressed as the Annual Percentage Rate or APR. Thus, closed-end credit satisfies this condition if the APR properly disclosed on the Truth-in Lending disclosure at consummation exceeds 36 percent.

- b. *At any time during the loan term, the lender or a service provider obtains a leveraged payment mechanism.* A lender or service provider<sup>7</sup> obtains a leveraged payment mechanism if it has the right to initiate a transfer of money, through any means, from a consumer's account<sup>8</sup> to satisfy an obligation on a loan. Comment 1041.3(c)-1. This includes, for example, the right to initiate a transfer from a consumer's account by means of a check, an electronic fund transfer, a remotely created check or payment order, or a transfer by an account-holding institution. Comment 1041.3(c)-2.

A lender or service provider obtains the ability to initiate a transfer from a consumer's account when it can collect payment or otherwise draw funds from a consumer's account (either on a single occasion or on a recurring basis) without the consumer taking further action. Generally, when a lender or service provider has the ability to "pull" funds or initiate a transfer from a consumer's account, that person has a leveraged payment mechanism. However, a "push" transaction from the consumer's account to the lender or service provider does not in itself give the lender or service provider a leveraged payment mechanism. Comment 1041.3(c)-1.

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<sup>7</sup> "Service provider" has the same meaning as in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 U.S.C. 5481(26). See Section 3 for more information on service providers.

<sup>8</sup> "Account" has the same meaning as in Regulation E, 12 CFR 1005.2(b). Generally, the term includes a demand deposit (checking), savings, or other consumer asset account established for personal, family, or household purposes and held by a financial institution. It includes payroll card accounts and government benefit accounts. Additionally, on or after April 1, 2019, it includes other prepaid accounts as defined in Regulation E.

A lender or service provider does not obtain a leveraged payment mechanism by initiating a single immediate payment transfer at a consumer's request. 12 CFR 1041.3(c). Section 4.5 provides additional information on single immediate payment transfers at a consumer's request, but a single immediate payment transfer at a consumer's request is generally a one-time transfer initiated within one business day after the consumer proffers a check or authorizes an electronic transfer. 12 CFR 1041.8(a)(2).

This condition is satisfied if a lender or service provider obtains a leveraged payment mechanism before, at the same time as, or after the consumer receives the entire amount of the loan proceeds and regardless of the means by which the lender or service provider obtains the leveraged payment mechanism. Comment 1041.3(b)(3)(ii)-1. This condition is satisfied if a loan agreement authorizes the lender to obtain a leveraged payment mechanism, regardless of the time at which the lender actually obtains the leveraged payment mechanism. For example, it is satisfied if the loan agreement provides that the consumer authorizes or must authorize the lender or service provider to debit the consumer's account on a recurring basis at some future date or on a one-time or recurring basis if the consumer becomes delinquent or defaults on the loan. Comment 1041.3(b)(3)(ii)-2.

**Examples:** Willow Lender obtains a check, draft, or similar paper instrument written by the consumer. Willow Lender does not use the instrument within one business day of obtaining it (*i.e.*, it is not a single immediate payment transfer at the consumer's request). Willow Lender has obtained a leveraged payment mechanism.

At consummation of a loan, Willow Lender obtains the consumer's authorization to initiate an electronic fund transfer from the consumer's account on the loan's due date, which is 14 days after consummation. Willow Lender has obtained a leveraged payment mechanism.

Willow Service Provider is a service provider for Willow Lender. A consumer obtains a loan from Willow Lender. At consummation of the loan, the consumer authorizes Willow Service Provider to create or present a remotely created check, remotely created payment order, or similar instrument drafted on the consumer's account on the loan's due date, which is 14 days after consummation. Willow Service Provider has obtained a leveraged payment mechanism.

Willow Lender extends a loan to a consumer. The consumer authorizes an automatic bill pay service offered by her account-holding financial institution, Ficus Bank, to initiate a transfer of money from the consumer's account to pay the loan from Willow Lender. Willow Lender has not obtained a leveraged payment mechanism because the authorization does not involve a transfer initiated by the lender.

5. For open-end credit, satisfies both of the following conditions:

- a. *The cost of credit for the loan exceeds 36 percent per annum either at consummation or at the end of a billing cycle, or the lender imposes a finance charge in any billing cycle in which the principal balance is \$0. Once open-end credit meets one of these conditions, it meets the condition for the duration of the plan. 12 CFR 1041.3(b)(3)(i)(B).*

For open-end credit, the cost of credit must be calculated according to the requirements of Regulation Z, 12 CFR 1026.14(c) and (d). 12 CFR

1041.2(a)(6)(ii)(B). However, the cost of credit is not calculated according to Regulation Z for billing cycles in which there is a finance charge but no other balance. If there is a billing cycle in which there is no balance other than a finance charge imposed by the lender, this condition is satisfied. Comment 1041.3(b)(3)-2.

- b. *The lender or a service provider obtains a leveraged payment mechanism.* The determination of whether a lender or service provider obtains a leveraged payment mechanism is the same for closed-end credit and open-end credit. Additional information on this condition is provided above.

**Example:** Willow Lender extends an open-end credit plan to a consumer primarily for personal, family, or household purposes. The loan is not a covered short-term loan or a covered longer-term balloon-payment loan, and is not excluded or exempted from coverage under the Payday Lending Rule. At consummation the lender obtains the right to initiate transfers from the consumer's account to satisfy the loan. At consummation, the cost of credit is 30 percent. The credit plan has monthly billing cycles, and in the second billing cycle the cost of credit is 45 percent. Beginning on the first day of the third billing cycle and for the remainder of the plan's duration, the loan is a covered longer-term loan. The lender must comply with the Payday Lending Rule (including but not limited to the prohibition discussed in Section 4 and the disclosure requirements discussed in Section 5) beginning on the first day of the third billing cycle.

- 6. *Does not satisfy an exclusion set forth in the Payday Lending Rule.* Section 2.4 discusses exclusions under the Payday Lending Rule.
- 7. *Does not satisfy a conditional exemption set forth in the Payday Lending Rule.* Section 2.5 discusses conditional exemptions under the Payday Lending Rule.

## 2.4 Exclusions from coverage

Credit is excluded from being a covered loan (*i.e.*, is not subject to the Payday Lending Rule) if it is any of the following:

1. *Purchase money security interest loan.* Credit<sup>9</sup> is excluded as a purchase money security interest loan if: (a) the credit is extended solely and expressly for the purpose of financing a consumer's initial purchase of a good (*e.g.*, a motor vehicle, television, household appliance, furniture); and (b) the credit is secured by that good. The exclusion can apply regardless of whether or not the security interest is perfected or recorded. 12 CFR 1041.3(d)(1); comment 1041.3(d)(1)-1. A loan is made solely and expressly to finance the consumer's purchase of a good even if the amount financed under the loan includes federal, state, or local taxes or amounts required to be paid under applicable state and federal licensing and registration requirements. The exclusion does not apply to a loan that refinances credit extended to purchase a good. Comment 1041.3(d)(1)-1.
2. *Real estate secured credit.* Credit is excluded as real estate secured credit if the credit is secured by any real property or by personal property (*e.g.*, mobile home, boat, cooperative unit) to be used as a dwelling. The exclusion only applies if the lender records or otherwise perfects the security interest within the term of the loan. 12 CFR 1041.3(d)(2); comment 1041.3(d)(2)-1.
3. *Credit card account.* Credit is excluded as a credit card account if it is a credit card account under an open-end (not home-secured) consumer credit plan, as defined in Regulation Z, 12 CFR 1026.2(a)(15)(ii). 12 CFR 1041.3(d)(3).
4. *Student loan.* Credit is excluded as a student loan if it is made, insured, or guaranteed pursuant to a program authorized by subchapter IV of the Higher Education Act of 1965, 20 U.S.C. 1070 through 1099d. Additionally, credit is

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<sup>9</sup> Transactions that do not constitute credit are not subject to the Payday Lending Rule. "Credit" means the right to defer payment of debt or to incur debt and defer payment. Generally, lenders may rely on the definition of "credit" found in Regulation Z, 12 CFR 1026.2(a)(14) and its related commentary, when determining the meaning of credit under the Payday Lending Rule. 12 CFR 1041.2(a)(11); comment 1041.2(a)(11)-1.

excluded if it is a private education loan as defined in Regulation Z, 12 CFR 1026.46(b)(5). 12 CFR 1041.3(d)(4).

5. *Non-recourse pawn loan.* Credit is excluded as a non-recourse pawn loan if both of the following conditions are satisfied: (a) the lender has sole physical possession and use of the property securing the loan for the entire loan term; and (b) the lender's sole recourse is the retention of that property. 12 CFR 1041.3(d)(5). Credit is not excluded as a non-recourse pawn loan if the consumer retains either possession or use of the property (regardless of how limited such possession or use might be), or if any consumer, co-signor, guarantor, or similar person is personally liable for the difference between the outstanding balance on the loan and the value of the pawned property. Comment 1041.3(d)(5)-1.
6. *Overdraft service; overdraft line of credit.* Overdraft services under Regulation E, 12 CFR 1005.17(a), and overdraft lines of credit otherwise excluded from the definition of overdraft services under Regulation E, 12 CFR 1005.17(a)(1), are excluded from coverage under the Payday Lending Rule. 12 CFR 1041.3(d)(6). Institutions may rely on Regulation E, 12 CFR 1005.17(a) and its related commentary, to determine whether credit is an overdraft service or overdraft line of credit that is excluded from the Payday Lending Rule. Comment 1041.3(d)(6)-1.
7. *Wage advance program.* Advances of wages that constitute credit are excluded from the Payday Lending Rule if all of the following are satisfied:
  - a. The advance is made by an employer, as defined in the Fair Labor Standards Act, 29 U.S.C. 203(d), or by the employer's business partner (*e.g.*, a company that provides payroll card services or accounting services to the employer, or a company that provides consumer financial products and services as part of the employer's benefits program such that the company would have information regarding the employee's accrued wages).
  - b. The credit is extended to the employer's employee.
  - c. The advance is made only against the accrued cash value of any wages the employee has earned up to the date of the advance. The amount advanced must not exceed the employee's accrued wages. Accrued wages are unpaid wages that the employee is entitled to receive for work performed for the employer in the event of separation. This amount is determined under applicable state law. Comment 1041.3(d)(7)(i)-1.

- d. Before funds are advanced, the entity advancing the funds warrants all of the following to the employee (as part of the contract between the parties and on behalf of itself and any business partners):
- (1) The consumer (*i.e.*, the employee) will not be required to pay any charges or fees in connection with the advance (other than a charge for participating in the wage advance program);
  - (2) The entity and its business partners do not have any legal or contractual claim or remedy against the consumer based on the consumer's failure to repay. This provision does not prevent the entity from obtaining a one-time authorization to seek repayment from the consumer's account. Comment 1041.3(d)(7)(ii)(B)-1;
  - (3) With respect to the amounts advanced, the entity and its business partners will not engage in any debt collection activities if the advance is not directly deducted from the consumer's wages or otherwise repaid on the scheduled due date;
  - (4) The entity and its business partners will not place the amount advanced as debt with a third party or sell it as debt to a third party; and
  - (5) The entity and its business partners will not report information to a consumer reporting agency concerning the amount advanced.

12 CFR 1041.3(d)(7).

8. *No cost advance.* Advances that constitute credit are excluded from the Payday Lending Rule if all of the following are satisfied:
- a. The consumer is not required to pay any charge or fee to be eligible to receive or in return for receiving the advance.
  - b. Before any amounts are advanced, the entity advancing the funds warrants all of the following to the consumer (as part of the contract between the parties):
    - (1) The entity does not have any legal or contractual claim or remedy against the consumer based on the consumer's failure to repay. This provision does not prevent the entity from obtaining a one-time authorization to seek repayment from the consumer's account. Comment 1041.3(d)(8)-1;

(2) With respect to the amounts advanced, the entity will not engage in any debt collection activities if the advance is not repaid on the scheduled date;

(3) The entity will not place the amount advanced as debt with a third party or sell it as debt to a third party; and

(4) The entity will not report information to a consumer reporting agency concerning the amount advanced.

12 CFR 1041.3(d)(8).

## 2.5 Conditional exemptions

The Payday Lending Rule includes two conditional exemptions. The first conditional exemption is for alternative loans, which are loans that generally conform to the NCUA's requirements for the PAL program.

The second conditional exemption is for accommodation loans, provided the lender together with its affiliates do not originate more than 2500 covered loans in a calendar year and did not derive more than 10 percent of their receipts from covered loans during the previous tax year.

Each of these conditional exemptions is discussed in more detail below. If a loan satisfies a conditional exemption, the loan is not subject to the Payday Lending Rule, even if it would otherwise be a covered loan.

☞ Certain debits or withdrawals initiated to collect payment on a covered loan are excluded from the prohibition discussed in Section 4 and the disclosure requirements discussed in Section 5, if the debits or withdrawals are initiated by a lender that also holds the consumer's account and other conditions are met. See Section 4.2 for more information on this conditional exclusion.

### 2.5.1 Alternative loans

A covered loan that satisfies the following conditions and requirements is an alternative loan and is exempt from the Payday Lending Rule:

1. *Loan term conditions.* An alternative loan must satisfy all of the following loan term conditions:



- a. The loan is not structured as open-end credit. Section 2.1 discusses when a loan is open-end credit under the Payday Lending Rule.
  - ☐ A loan made by a federal credit union in compliance with the NCUA's conditions for a Pay day Alternative Loan (PAL) as set forth in 12 CFR 701.21(c)(7)(iii) is deemed to be an alternative loan (and therefore exempt) under the Payday Lending Rule. 12 CFR 1041.3(e)(4).
  - ☐ All lenders, including but not limited to federal credit unions, may make an alternative loan that is exempt from the Pay day Lending Rule, provided the loan is permissible under other applicable laws, including state laws. Comment 1041.3(e)-1.
- b. The loan's term is not less than one month and not more than six months.
- c. The loan's principal is not less than \$200 and not more than \$1000.
- d. The loan is repayable in two or more payments.
- e. All scheduled payments are substantially equal in amount and fall in substantially equal intervals. Payments are substantially equal in amount if the amount of each scheduled payment is equal to or within a small variation of the others. A lender may disregard the effects of collecting the payments in whole cents. The intervals for scheduled payments are substantially equal if the payment schedule requires repayment on the same date each month or in the same number of days from the prior scheduled payment. A lender may disregard slight payment schedule changes caused by months having a different number of days, the occurrence of a leap year, or the fact that a payment would otherwise fall on a day that is not a business day. Comments 1041.3(e)(1)(iv)-1 and -2.

**Examples:** A loan is repayable in six biweekly payments and the amount of each scheduled payment is within 1 percent of the amount of the other payments. The loan is repayable in substantially equal payments and in substantially equal intervals.

A loan is repayable in monthly payments that are due on the 15<sup>th</sup> of each month. The loan is repayable in substantially equal intervals.

- f. The loan amortizes completely during its term.
  - g. The lender does not impose any charges other than the rate and the application fees permissible for federal credit unions under the NCUA's regulations at 12 CFR 701.21(c)(7)(iii). An application fee must reflect the actual costs associated with processing the application and must not exceed \$20. Comment 1041.3(e)(1)(v)-1.
- ☐ An alternative loan cannot have interest-only payments or a payment schedule that front-loads payments of interest and fees. See Comment 1041.3(e)(1)(iv)-3.

12 CFR 1041.3(e)(1).

*2. Borrower history conditions.*

Before making the loan, the lender must review its own records to determine certain things about the consumer's borrowing history. Specifically, the lender must determine that the loan will not result in the borrower being indebted on more than three outstanding alternative loans within a period of 180 days. 12 CFR 1041.3(e)(2); comment 1041.3(e)(2)-3. The 180-day period begins on the date that is 180 days prior to the loan's consummation date and ends on the loan's consummation date. Comment 1041.3(e)(2)-2.

- ☐ If the lender determines that the loan will result in the borrower being indebted on more than three outstanding alternative loans within 180 days, the loan cannot be an alternative loan. 12 CFR 1041.3(e)(2). The lender is only required to review its own records to make this determination. It does not need to obtain information, such as a consumer report, from third parties. Comment 1041.3(e)(2)-1.

A loan is an outstanding loan if the consumer is legally obligated to repay the loan, regardless of whether the loan is delinquent or is subject to a repayment plan or other workout arrangement. However, a loan ceases to be an outstanding loan if the consumer has not made at least one payment on the loan within the previous 180 days. 12 CFR 1041.2(a)(17). A loan ceases to be an outstanding loan as of the earliest of the date that: (a) the consumer repays the loan in full; (b) the consumer is released from the legal obligation to repay the loan; (c) the loan is legally discharged; or (d) is 180 days following the consumer's last payment of any amount on the loan (*i.e.*, includes

payments that are not on a scheduled date or in a scheduled amount). Comment 1041.3(a)(17)-2. A loan is an outstanding loan regardless of whether the consumer is required to pay the lender, the lender's affiliate, or a service provider. Additionally, a lender's sale of the loan or servicing rights does not affect whether the loan is an outstanding loan under the Payday Lending Rule. Comment 1041.2(a)(17)-1.

Additionally, a lender cannot make more than one alternative loan at a time to a consumer. 12 CFR 1041.3(e)(2).

3. *Income documentation condition.* During the time period that the lender is making alternative loans, the lender must maintain and comply with policies and procedures for documenting proof of recurring income. 12 CFR 1041.3(e)(3). A lender may establish any procedure for documenting recurring income that satisfies the lender's own underwriting obligations. For example, a lender could obtain two recent paycheck stubs. Comment 1041.3(e)(3)-1.

## 2.5.2 Accommodation loans

If the following conditions and requirements are satisfied, a covered loan is an accommodation loan and is exempt from the Payday Lending Rule:

1. *Loan volume.* The lender and its affiliates collectively have made 2500 or fewer covered loans in the current calendar year, and made 2500 or fewer covered loans in the preceding calendar year. 12 CFR 1041.3(f)(1).

Covered longer-term loans for which all transfers meet the conditions in 12 CFR 1041.8(a)(1)(ii) are not included for the purpose of determining whether this loan volume requirement is met. These conditions, which are discussed in Section 4.2, are that:

- a. The lender is also the account-holding institution for the consumer's account; and
- b. The lender, pursuant to the terms of the loan agreement or account agreement, (1) does not charge the consumer any fee in the event that the lender initiates a transfer of funds from the consumer's account in connection with the covered loan for an amount that the account lacks sufficient funds to cover (a lender may still charge a late payment fee if the consumer's payment

is late); and (2) does not close the consumer’s account in response to a negative balance that results from a transfer connected to a covered loan.

12 CFR 1041.3(f)(3) and .8(a)(1)(ii). See also comment 1041.3(f)-1.

2. *Receipts.* The lender and certain of its affiliates derived no more than 10 percent of their receipts from covered loans in the prior tax year or, if the lender was not in operation in a prior tax year, the lender reasonably anticipates that the lender and its affiliates will derive no more than 10 percent of their receipts from covered loans during the current tax year.

□ For purposes of calculating receipts, “tax year” is an annual accounting period for keeping records and reporting income and expenses. The term has the same meaning under the Payday Lending Rule and in IRS Publication 538. 12 CFR 1041.3(h).

The exact nature of this calculation depends on whether the lender was in operation during a prior tax year. If the lender was in operation in a prior tax year, the lender and any of its affiliates that were in operation in a prior tax year and used the same tax year as the lender must have derived no more than 10 percent of their receipts from covered loans during the most recent completed tax year. If the lender was not in operation in a prior tax year, the lender must reasonably anticipate that it and its affiliates that use the same tax year as it does will derive no more than 10 percent of their receipts from covered loans during the current tax year. 12 CFR 1041.3(f)(2). A lender and its affiliates can look to receipts to date in forecasting their total receipts for the current tax year, but are expected to make reasonable adjustments to account for upcoming substantial changes in business plans or other relevant factors (if known). Comment 1041.3(f)-2.

For the purpose of this calculation, “receipts” means “total income” (or “gross income” for sole proprietorships) plus “costs of goods sold” as those terms are defined and reported under Internal Revenue Service (IRS) tax return forms (*e.g.*, Form 1120 for corporations, Form 1120S and Schedule K for S corporations, Form 1120, 1065 or 1040 for limited liability companies, Form 1065 and Schedule K for partnerships, and Schedule C of Form 1040 for sole proprietorships). Receipts do not include: (1) net capital gains or losses; (2) taxes collected and remitted to a taxing authority if included in gross or total income (*e.g.*, sales or other taxes collected from customers) (but taxes levied on the entity or its employees are not excluded from receipts); or (3) amounts collected for another (but fees earned in connection with such collections are

receipts). Items such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs (*e.g.*, payroll taxes) are included in receipts. 12 CFR 1041.3(g).

Covered longer-term loans for which all transfers meet the conditions in 12 CFR 1041.8(a)(1)(ii) are not included for the purposes of determining whether the receipts requirement is met. These conditions, which are discussed in Section 4.2, are that:

- a. The lender is also the account-holding institution for the consumer's account; and
- b. The lender, pursuant to the terms of the loan agreement or account agreement, (1) does not charge the consumer any fee in the event that the lender initiates a transfer of funds from the consumer's account in connection with the covered loan for an amount that the account lacks sufficient funds to cover (a lender may still charge a late payment fee if the consumer's payment is late); and (2) does not close the consumer's account in response to a negative balance that results from a transfer connected to a covered loan.

12 CFR 1041.3(f)(3) and .8(a)(1)(ii). See also comment 1041.3(f)-1.

# 3. Lenders and service providers under the Payday Lending Rule

Generally, the Payday Lending Rule applies to “covered loans” made by “lenders” as those terms are defined in the Rule. However, in some business arrangements, service providers or other parties conduct certain functions on behalf of lenders. Despite the formal division of functions between the parties, the Payday Lending Rule treats loans made pursuant to such business arrangements the same as loans made by a single entity, and such loans would be covered loans if they otherwise satisfy the definition of “covered loan.”

This Section 3 discusses when a person meets the definition of “lender” or “service provider” under the Payday Lending Rule.

## 3.1 Lenders

For purposes of the Payday Lending Rule, a “lender” is a person who regularly extends credit to consumers primarily for personal, family, or household purposes. 12 CFR 1041.2(a)(13). The Payday Lending Rule relies on the Regulation Z test for determining whether a person regularly extends credit for personal, family, or household purposes. That test is explained in Regulation Z, 12 CFR 1026.2(a)(17)(v) and its related commentary. Comment 1041.2(a)(13)-1. Generally, a person satisfies the “regularly extends credit” test in Regulation Z if the person extended credit more than 25 times in either the preceding or current calendar year.<sup>10</sup> See 12 CFR

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<sup>10</sup> A person also satisfies the “regularly extends credit” test if the person extended credit secured by a dwelling more than five times in either the preceding or current calendar year or if in any 12-month period the person originated more than one extension of credit that is a high-cost mortgage subject to 12 CFR 1026.32 or one or more such credit extensions through a mortgage broker. See 12 CFR 1026.2(a)(17)(v). As discussed in Section 2.4 of this guide, perfected mortgage loans are excluded from being covered loans under the Payday Lending Rule. However, a lender could satisfy the “regularly extends credit” test by extending credit that is not subject to the Payday Lending Rule. If the lender subsequently extends one or more covered loans, it would be subject to the Rule.

1026.2(a)(17)(v). Any loan extended to a consumer primarily for personal, family, or household purposes, whether or not the loan is a covered loan under the Payday Lending Rule, counts toward the numeric threshold for determining whether a person regularly extends credit. Comment 1041.2(a)(13)-1. For closed-end credit, a person counts each credit transaction. For open-end credit, a person counts each account, not each individual credit extension or advance. See Comment 1026.2(a)(17)(i)-4.

☞ The term “credit” has the same meaning in the Payday Lending Rule as it does in Regulation Z, 12 CFR 1026.2(a)(14), and means the right to defer payment of debt or to incur debt and defer payment. 12 CFR 1041.2(a)(11), 1026.2(a)(14). Generally, lenders may rely on the definition of “credit” found in Regulation Z, 12 CFR 1026.2(a)(14) and its related commentary, when determining the meaning of “credit” under the Payday Lending Rule. Comment 1041.2(a)(11)-1.

If a person satisfied the test in the preceding calendar year, the person is a lender in the current calendar year. If the person did not satisfy the test in the preceding calendar year but satisfies the test in the current calendar year, the person is a lender after the “more than 25 times” numeric threshold is met in the current calendar year as well as in the next calendar year.

**Example:** In 2019, Willow Lender extends credit primarily for personal, family, or personal purposes 23 times. None of the extensions of credit is secured by a dwelling. In 2020, Willow Lender extends credit primarily for personal, family, or household purposes 75 times. None of the extensions of credit is secured by a dwelling. Willow Lender is not a lender in 2019, but is a lender in 2020 after it makes the 25<sup>th</sup> extension of credit primarily for personal, family, or personal purposes. Additionally, Willow Lender is a lender for all of 2021.

## 3.2 Service providers

A person is a “service provider” under the Payday Lending Rule if the person is a service provider under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 U.S.C. 5481(26). 12 CFR 1041.2(a)(18). Generally, a person that provides a material

service to a lender in connection with the lender's offering or provision of covered loans is a service provider under the Payday Lending Rule, subject to the specific limitations in Section 1002(26) of the Dodd-Frank Act. Accordingly, for example, credit access businesses and credit service organizations that provide a material service to a lender during the course of a consumer obtaining loans (or assisting consumers in obtaining loans) from the lender are service providers, subject to the specific limitations in Section 1002(26) of the Dodd-Frank Act.

Comment 1041.2(a)(18)-1. A service provider may be held liable on the same terms as a lender to the extent that a service provider violates the Payday Lending Rule while acting on behalf of a lender or another service provider.



# 4. Prohibited payment transfer attempts

Generally, the Payday Lending Rule prohibits a lender from attempting to initiate a payment transfer (as that term is defined in the Rule) in connection with a covered loan if the lender previously has made two consecutive failed payment transfers in connection with a covered loan, unless the lender obtains a new and specific authorization from the consumer. The Rule permits a lender to initiate an additional payment transfer without a new and specific authorization if the consumer requests a single immediate payment transfer. 12 CFR 1041.8.

- ☐ It is an unfair and abusive practice for a lender to attempt to withdraw a payment from a consumer's account in violation of the Rule's prohibition regarding payment transfers. 12 CFR 1041.7.
- ☐ The Payday Lending Rule's prohibition on payment transfer attempts and the NACHA rules governing withdrawal attempts differ. Lenders must comply with the Payday Lending Rule even if its requirements differ from other applicable requirements.

As discussed in Section 4.1, the payment transfers subject to this prohibition are generally debits or withdrawals of funds that a lender initiates from a consumer's account for the purpose of collecting any amount due or purported to be due in connection with a covered loan. Certain debits and withdrawals from a consumer's account are not payment transfers under the Rule if the lender initiating the transfer holds the consumer's account and meets other requirements as discussed in Section 4.2.

- ☐ If a lender has initiated two consecutive failed payment transfers from a consumer's account, the lender is also required to provide the consumer with a consumer rights notice. This notice and other disclosures required under the Payday Lending Rule are discussed in Section 5.

Section 4.3 discusses the prohibition in more detail, including providing information about when a lender has made two consecutive failed payment transfers in connection with a covered loan.

Section 4.4 discusses the authorization needed to initiate an additional transfer after two consecutive failed payment transfers, and Section 4.5 discusses single immediate payment transfers that are permitted without such an authorization.

Section 4.6 discusses the requirement not to take actions with the intent of evading the Rule’s payment transfer prohibition.

## 4.1 Payment transfers

The Payday Lending Rule prohibits a lender from making or attempting to make certain “payment transfers” as discussed in Section 4.3. This subsection summarizes what a “payment transfer” is for purposes of the Rule’s prohibition. Section 4.2 discusses a conditional exclusion from the definition of the term “payment transfer.” If a lender that also holds the consumer’s account meets the conditions for the exclusion, a debit or withdrawal from the consumer’s account is not a “payment transfer” for purposes of the Payday Lending Rule.

☞ “Account” has the same meaning as in Regulation E, 12 CFR 1005.2(b). Generally, the term includes a demand deposit (checking), savings, or other consumer asset account established for personal, family, or household purposes and held by a financial institution. It includes payroll card accounts and government benefit accounts. Additionally, on or after April 1, 2019, it includes other prepaid accounts as defined in Regulation E.

“Payment transfer” means a debit or withdrawal of funds from a consumer’s account that the lender initiates for the purpose of collecting any amount due or purported to be due in connection with a covered loan. A debit or withdrawal meeting this description is a payment transfer regardless of the means the lender uses to initiate it. For example, a payment transfer includes but is not limited to a debit or withdrawal initiated by an electronic fund transfer<sup>11</sup>

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<sup>11</sup> See 12 CFR 1005.3(b) and its related commentary to determine the meaning of “electronic fund transfer.” Any electronic fund transfer meeting the Payday Lending Rule’s definition of payment transfer is a payment transfer, including electronic fund transfers initiated by a debit card or a prepaid card. Comment 1041.8(a)(1)(i)(A)-1.

(such as a debit card, prepaid card, or ACH transfer), a signature check, a remotely created check, and a remotely created payment order. 12 CFR 1041.8(a)(1)(i).

A payment transfer is initiated by a lender if it is initiated by the lender or the lender's agent. The lender's agent may include a payment processor. Comment 1041.8(a)(1)-1. A lender does not initiate a payment transfer when a consumer makes a payment (on the consumer's own initiative or in response to a lender's request or demand) in cash withdrawn by the consumer from the consumer's account or via an online or mobile bill payment service offered by the institution that holds the consumer's account. Additionally, a transfer is not initiated by a lender if the lender seeks repayment of a covered loan pursuant to a valid court order authorizing the lender to garnish the consumer's account. Comment 1041.8(a)(1)-4.

Unless the conditional exclusion discussed in Section 4.2 applies, a lender that is also the account-holding institution initiates a payment transfer if it does any of the following:

1. Initiates an internal transfer from a consumer's account to collect a payment on a covered loan;
2. Sweeps a consumer's account in response to a delinquency on a covered loan; or
3. Exercises a right to set off or offset in order to collect an outstanding balance on a covered loan.

Comment 1041.8(a)(1)(i)(E)-2.

A payment transfer is initiated for the purpose of collecting any amount due or purported to be due in connection with a covered loan if the transfer is for:

1. The amount of a scheduled payment due under a covered loan's loan agreement;
2. An amount smaller than the amount of a scheduled payment due under a covered loan's loan agreement;
3. The amount of the entire unpaid loan balance collected pursuant to an acceleration clause in a covered loan's loan agreement; or
4. The amount of a late fee or other penalty assessed pursuant to a covered loan's loan agreement.

Comment 1041.8(a)(1)-2.

A transfer for an amount that the consumer disputes or does not legally owe is a payment transfer if it otherwise meets the Payday Lending Rule’s definition of payment transfer. Comment 1041.8(a)(1)-3.

## 4.2 Conditional exclusion for certain transfers made by an account-holding institution

When the lender is the institution that also holds the consumer’s account, a transfer initiated by that institution generally qualifies as a payment transfer under the Rule. However, a transfer initiated by the institution holding the consumer’s account is not a payment transfer if both of the following conditions are met:

1. *The lender does not charge the consumer any fee under the loan agreement or account agreement in the event that the lender initiates a transfer from the consumer’s account in connection with the covered loan and the account lacks sufficient funds to cover the transfer.* This condition does not restrict the lender’s ability to charge a late payment fee on the covered loan. The loan agreement or account agreement setting forth the fee restrictions must be in effect when the loan is made and for the duration of the loan. Examples of fees subject to this restriction include but are not limited to nonsufficient fund fees, overdraft fees, and returned item fees. Comments 1041.8(a)(1)(ii)(A)-1 and -2.

2. *The lender does not close the consumer’s account in response to a negative balance that results from a transfer initiated in connection with the covered loan.* This condition is only met if the terms of the loan agreement or

☞ If a transfer meets both of these conditions, it is not a payment transfer and is not subject to the requirements set forth in 12 CFR 1041.8 or 1041.9. Additionally, initiating the transfer is not an unfair or abusive practice under 12 CFR 1041.7. See comment 1041.8(a)(1)(ii)-1. However, the lender is still required to comply with the compliance program and record retention requirements (discussed in Section 6) with regard to the covered loan.

☞ Lenders that wish to rely on this conditional exclusion should ensure that their loan agreements or account agreements contain the necessary restrictions.

account agreement provide that the lender will not close the account in such circumstances. The agreement must be in effect when the lender makes the covered loan and for the duration of the loan. Comment 1041.8(a)(1)(ii)(B)-2. A lender may close the account in response to events other than a transfer initiated in connection with the covered loan, such as at the consumer's request. Comment 1041.8(a)(1)(ii)(B)-1.

12 CFR 1041.8(a)(1)(ii).

## 4.3 Prohibition on making certain payment transfers

Generally, a lender is prohibited from initiating payment transfers after the lender has attempted to initiate two consecutive failed payment transfers from the consumer's account in connection with any covered loan the consumer has with the lender. This prohibition does not apply to a subsequent payment transfer if: 1) the consumer has authorized the payment transfer in accordance with the conditions and requirements discussed in Section 4.4; or 2) the payment transfer is a single immediate payment transfer as discussed in Section 4.5.

### 4.3.1 Failed payment transfers

For purposes of this prohibition, a payment transfer is a failed payment transfer if it results in a return indicating that the consumer's account lacks sufficient funds (*i.e.*, it is returned unpaid or is declined due to nonsufficient funds in the consumer's account). Comment 1041.8(b)(1)-1. If the lender is the institution that holds the consumer's account, a payment transfer is also a failed payment transfer if the account lacks sufficient funds to cover the amount of the transfer, regardless of how the result is classified or coded in the lender's internal systems or processes. A lender does not initiate a failed payment transfer if the lender merely defers or foregoes debiting or withdrawing payment based on the lender's observation that a consumer's account lacks sufficient funds to cover the payments. Comment 1041.8(b)(1)-4.

### 4.3.2 First failed payment transfer

A failed payment transfer is a first failed payment transfer from the consumer's account if it meets any of the following conditions:

1. The lender has initiated no other payment transfers from the account in connection with the covered loan or any other covered loan that the consumer has with the lender;
2. The immediately preceding payment transfer was successful, regardless of whether the lender has previously initiated a first failed payment transfer;<sup>12</sup> or
3. The payment transfer is the first payment transfer to fail after the lender obtains the consumer's new and specific authorization for additional payment transfers as discussed in Section 4.4.

12 CFR 1041.8(b)(2)(i).

### 4.3.3 Second failed payment transfer

A failed payment transfer is the second failed payment transfer from the consumer's account if the immediately preceding payment transfer (including a payment transfer initiated at the same time or on the same day) was a first failed payment transfer.

### 4.3.4 When the consumer has multiple covered loans or accounts

If the consumer has more than one covered loan with the lender, the two consecutive failed payment transfers do not need to be initiated in connection with the same covered loan for the prohibition to be triggered, but rather can be initiated in connection with two different covered loans. Comment 1041.8(b)-3. However, the prohibition does not apply to payment transfers initiated in connection with a bona fide subsequent covered loan that was originated after the prohibition was triggered, unless the lender separately triggers the prohibition with regard to that loan. A bona fide subsequent covered loan does not include a covered loan that refinances or rolls over any covered loan that the consumer has with the lender at the time that the prohibition is triggered. Comment 1041.8(b)-4.

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<sup>12</sup> Note that, depending on the relevant facts and circumstances, a lender may violate the Payday Lending Rule's prohibition on evasion if, after initiating a first failed payment transfer, it initiates a successful payment transfer for a minimal amount (*e.g.*, \$1) with the intent of causing a later payment transfer in a larger amount to be a first failed payment transfer (in the event it fails), rather than the second failed payment transfer it otherwise would have been. See comment 1041.8(e)-2.

However, the prohibition applies only to the account from which the lender attempted to initiate the two consecutive failed payment transfers. Comment 1041.8(b)-2. In other words, it does not apply to the consumer's other accounts, if any.

**Examples:** On April 1, Willow Lender initiates an electronic fund transfer from the consumer's account to collect payment on the consumer's covered loan. Prior to April 1, Willow Lender has not initiated any failed payment transfers from the consumer's account. The transfer is returned for nonsufficient funds. It is the first failed payment transfer. On April 2, Willow Lender re-initiates the electronic fund transfer from the consumer's same account, and the transfer is processed and completed. Because this attempt does not fail, the number of consecutive failed payment transfers resets to zero. On April 15, Willow Lender initiates another electronic fund transfer from the consumer's same account to collect payment on the covered loan. The transfer is returned for nonsufficient funds. It is the first failed payment transfer.

A consumer has two covered loans, Loan A and Loan B, with Ficus Lender and only one deposit account. Prior to April 1, Ficus Lender has not initiated any failed payment transfers from the consumer's account. On April 1, Ficus Lender initiates an electronic fund transfer to collect a regularly scheduled payment on Loan A. The transfer is returned for nonsufficient funds. It is the first failed payment transfer. Ficus Lender does not initiate any payment transfers to collect either loan until April 15. On that day, Ficus Lender processes a remotely created check through the check system to collect a regularly scheduled payment on Loan B. The remotely created check is returned for nonsufficient funds. It is the second failed payment transfer.

For additional examples, see comments 1041.8(b)(2)(i)-1 and .8(b)(2)(ii)-1 and -2.

## 4.4 Exception for additional payment transfers authorized by the consumer in a new and specific authorization

The prohibition on initiating additional payment transfers after two consecutive failed payment transfers does not apply if the consumer authorizes the additional payment transfers in accordance with the Payday Lending Rule's timing, form, and other requirements. 12 CFR 1041.8(c). Generally, the new and specific authorization for additional payment transfers must be obtained

after the lender provides a request as discussed in Section 4.4.1. The authorization itself must meet the delivery, content, and form requirements discussed in Sections 4.4.2.

The exception for additional transfers does not apply to another authorization from the consumer that the lender holds at the time the prohibition is triggered. The lender must obtain a new and specific authorization that satisfies the Rule's timing, form, and other requirements, as discussed in this Section 4.4. See comment 1041.8(b)-1.

☞ In addition to the exception for additional payment transfers authorized by the consumer as discussed in this Section 4.4, a lender is also permitted to execute a single immediate payment transfer at the consumer's request. See Section 4.5 for more information on single immediate payment transfers.

### 4.4.1 Timing and other requirements for requesting a new and specific authorization

The Payday Lending Rule ties the timing for requesting an authorization for additional payments after two consecutive failed payment transfers to the consumer's receipt of a separate notice required under the Rule. Specifically, the Rule is structured to ensure that a consumer receives a consumer rights notice that provides information about the failed payment transfers and the Rule's prohibition at or before the time that the consumer receives the request for a new and specific authorization. Thus, the lender may request the consumer's new and specific authorization for additional payment transfers no earlier than the date on which the lender provides this consumer rights notice. If the consumer rights notice is mailed, the lender must not request or obtain the new and specific authorization before the date on which the consumer



is deemed to receive the consumer rights notice (*i.e.*, on the earlier of the third business day after mailing or on the date that the consumer affirmatively responds to the mailed notice). Comment 1041.8(c)(3)(ii)-1. If a consumer rights notice is sent electronically, the notice is deemed to be received the day it is sent. Thus, a lender may request and obtain a new and specific authorization on the day that the lender electronically sends the consumer rights notice. The consumer rights notice is discussed in Section 5.4.

Generally, the request must include the specific date, specific amount, and specific payment channel of each additional payment transfer that will be authorized. 12 CFR 1041.8(c)(2)(i). As discussed in Section 4.4.2, this information is also required in the authorization. However, for payment transfers initiated to collect late fees or returned item fees, the request does not need to include the specific date or specific amount of the payment transfers. For such payment transfers, the request must include a clear and readily understandable statement that payment transfers may be initiated solely to collect a late fee or returned item fee and must specify the highest amount that may be charged for such fees and the payment channel to be used. 12 CFR 1041.8(c)(2)(iii) and (c)(3)(iii).

The Payday Lending Rule does not prohibit a lender from providing different options for the consumer to select with respect to the date, amount, or payment channel of each additional payment transfer. Additionally, if a consumer declines a request, the Payday Lending Rule does not prohibit the lender from making a follow-up request with a different set of terms. Comment 1041.8(c)(3)(ii)-2.

The lender may provide the request in writing, by mail, or in person. The request may be provided by email or another electronic delivery method in accordance with the consumer consent requirements in the Payday Lending Rule but without regard to the consumer consent provisions of the E-Sign Act. Comment 1041.8(c)(3)(ii)(A)-2. The Payday Lending Rule's

☞ A lender may provide the consumer rights notice and request the consumer's new and specific authorization in the same communication. However, the consumer rights notice must be provided in accordance with the segregated information requirements discussed in Section 5.1.4. Thus, a lender could send the consumer rights notice and the request for the authorization as two separate pieces of paper in the same envelope or provide the notice in the body of an email and the request in an attachment to the same email. After the text of the consumer rights notice, the lender could explain that the attachment is a request for an authorization. Comment 1041.8(c)(3)(ii)(A)-3.

consumer consent requirements for electronic delivery are discussed in Section 5.1.3.<sup>13</sup> The lender may also provide the request by email if the request is retainable and the consumer agrees to receive the request by email in the course of a communication initiated by the consumer in response to the consumer rights notice (see example below). 12 CFR 1041(c)(3)(ii)(A). The lender may provide the request by oral telephone communication if the consumer contacts the lender by phone in response to the consumer rights notice and agrees to receive the notice in the course of and as part of the same phone communication. 12 CFR 1041.8(c)(3)(ii)(B).

**Example:** Willow Lender mails a consumer rights notice to a consumer who has not consented to receive disclosures by email. In response to the notice, the consumer calls Willow Lender to discuss payment options, including the option of authorizing additional payment transfers. The consumer asks Willow Lender to provide the request for authorization via email. Willow Lender may provide the request via email because the consumer has agreed to receive the request via email in the course of a communication that the consumer initiated in response to the consumer rights notice.

#### 4.4.2 Form, delivery, and content requirements for a new and specific authorization

Except as discussed below, the consumer's new and specific authorization must include the specific date, specific amount, and specific payment channel of each additional payment transfer that the consumer is authorizing. The specific date must include the month, day, and

☞ The new and specific authorization required under the Payday Lending Rule for additional payment transfers is in addition to, not in lieu of, any separate payment authorization or instrument required under other applicable law. Comment 1041.8(c)(1)-1.

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<sup>13</sup> Section 5.1.3 also discusses electronic short notice requirements for electronic delivery. The electronic short notice requirements do not apply to electronic delivery of requests for new and specific authorizations.

year. The amount of the transfer that the lender initiates pursuant to the exception must either be for the exact amount stated in the authorization or for a smaller amount. A payment transfer may not be for a larger amount than stated in the authorization. Comments 1041.8(c)(2)(i)-1 through -4.

For a payment transfer solely to collect a late fee or returned item fee, the authorization does not need to include a specific date or specific amount. Comment 1041.8(c)(2)(iii)-1. However, it must include a clear and readily understandable statement that payment transfers may be initiated solely to collect a late fee or returned item fee and must specify the highest amount that may be charged for such fees and the payment channel to be used. 12 CFR 1041.8(c)(2)(iii).

☞ If a payment transfer that the consumer has authorized in a new and specific authorization is returned for nonsufficient funds, the lender may re-initiate the payment transfer without an additional new and specific authorization. However, the prohibition on initiating additional payment transfers after two consecutive failed attempts separately applies to such payment transfers. 12 CFR 1041.8(c)(2)(ii). See also Section 4.4.3 regarding the expiration of new and specific authorizations.

In order for a new and specific authorization to be valid, it must be signed, otherwise agreed to by the consumer in writing, or agreed to by the consumer electronically (including in the course of a telephone conversation if certain conditions are met). The consumer must sign or otherwise agree to the authorization no earlier than the date that the consumer receives the consumer rights notice. For these purposes, the consumer has received the consumer rights notice at the time it is provided to the consumer in person or electronically. If the notice is mailed, the consumer is considered to have received it on the earlier of the third business day after mailing or on the date that the consumer affirmatively responds to the mailed notice. 12 CFR 1041.8(c)(3)(iii). For more information on the consumer rights notice, see Section 5.4.

If the new and specific authorization is obtained electronically, it is valid only if it is signed or otherwise agreed to by the consumer in accordance with the signature requirements of the E-Sign Act. 12 CFR 1041.8(c)(3)(iii)(A). See comment 1041.8(c)(3)(iii)(A)-1.

A written or electronic authorization must be in a form that the consumer can retain. The authorization that the consumer can retain must memorialize the date, amount, and payment channel of each authorized additional payment transfer, except for additional payment transfers solely to collect a late fee or returned item fee. If the consumer cannot immediately retain a

copy of the new and specific authorization after signing or otherwise agreeing to it (as when a lender obtains the consumer's authorization in the course of a telephone communication), the lender must provide the consumer with a memorialization of the new and specific authorization in retainable form on or before the date that the lender initiates the first additional payment transfer pursuant to the authorization. 12 CFR 1041.8(c)(3)(iii). Providing a copy of a recorded call does not satisfy the requirement to memorialize the authorization in retainable form. Comment 1041.8(c)(3)(iii)(C)-2.

The memorialization is deemed to be provided to the consumer on the date it is mailed or transmitted. Comment 1041.8(c)(3)(iii)(C)-1. A lender can email the memorialization to the consumer if the consumer has consented to receive disclosures by email in accordance with the requirements and conditions that apply to the request for an authorization to be provided via email (discussed in Section 4.4.1). Comment 1041.8(c)(3)(iii)(C)-3.

### 4.4.3 Expiration of a new and specific authorization

A new and specific authorization becomes null and void for purposes of the exception if:

1. The lender subsequently obtains a new authorization from the consumer pursuant to 12 CFR 1041.8(c) (*i.e.*, a “new” new and specific authorization); or
2. Two consecutive payment transfers initiated pursuant to the authorization fail.

12 CFR 1041.8(c)(4).

## 4.5 Single immediate payment transfers at the consumer's request

A lender may initiate a “single immediate payment transfer at the consumer's request” without obtaining an authorization that complies with the requirements discussed in Section 4.4 if certain other requirements, discussed below, are met.

A “single immediate payment transfer at the consumer's request” is a payment transfer initiated by either: (a) a one-time electronic fund transfer within one business day after the lender obtains the consumer's authorization for the one-time electronic fund transfer, or (b) a payment transfer initiated by means of processing the consumer's signature check through the check

system or the ACH system within one business day after the consumer provides the check to the lender (or if the consumer mails the check, within one business day after the lender receives the check). 12 CFR 1041.8(a)(2); comment 1041.8(a)(2)(ii)-2. A transfer is “initiated” for this purpose at the time that the lender or its agent sends the transfer to a third party or the transfer is otherwise outside the lender’s control. Comment 1041.8(a)(2)(ii)-1.

In order to satisfy the Rule’s timing requirements, the consumer must authorize the underlying one-time transfer or provide an underlying signature check (as applicable) to the lender no earlier than the date on which the lender provides the consumer rights notice to the consumer or on the date that the consumer affirmatively contacts the lender to discuss repayment options, whichever is earlier. 12 CFR 1041.8(d). As discussed in Section 5.4, the lender must send the consumer’s right notice no later than three business days after receiving information that the second consecutive attempt has failed.

☞ A lender is permitted to initiate a single immediate payment transfer only once. Thus, if a lender has triggered the prohibition by initiating two consecutive failed payment transfers and then initiates a single immediate payment transfer that fails, the lender is not permitted to re-initiate the single immediate payment transfer, unless the lender obtains a new and specific authorization under 12 CFR 1041.8(c), a new authorization for a single immediate transfer under 12 CFR 1041.8(d), or a new signature check under 12 CFR 1041.8(d). Comment 1041.8(b)(2)(ii)-3.

**Example:** Willow Lender obtains a consumer’s authorization for a one-time electronic fund transfer at 2 pm, and sends the payment entry to its agent, a payment processor, at 5 pm on the same day. The agent sends the payment entry to the lender’s bank for further processing at 8 am on the next business day. The transfer is initiated at 8 am on the next business day, and the condition to initiate the transfer within one business day is satisfied.

## 4.6 Prohibition on evasion

A lender must not take any action with the intent of evading the Payday Lending Rule’s prohibition on payment transfers. 12 CFR 1041.8(e).

The actual substance of the lender's action as well as other relevant facts and circumstances will determine whether the lender's action was taken with the intent of evading the Payday Lending Rule. If the lender's action is taken solely for legitimate business purposes, it is not taken with the intent of evading the Rule. However, if a consideration of all relevant facts and circumstances reveals the presence of a purpose that is not a legitimate business purpose, the lender's action may have been taken with the intent of evading the Rule. A lender's action that is taken with the intent of evading the Rule may be knowing or reckless. Fraud, deceit, or other unlawful or illegitimate activity may be one fact or circumstance relevant to a determination of whether a lender's action was taken with the intent of evading the Rule, but fraud, deceit, or other unlawful or illegitimate activity is not a prerequisite. Comment 1041.8(e)-1.

For an illustrative example regarding the prohibition on evasion, see comment 1041.8(e)-2.

# 5. Disclosure of payment transfer attempts

In the Payday Lending Rule, there are three types of disclosures related to payment transfers initiated in connection with a covered loan:

1. *First payment withdrawal notice.* A lender must provide a first payment withdrawal notice to a consumer in advance of initiating the first payment withdrawal from a consumer's account. 12 CFR 1041.9(b)(1) and (2).
2. *Unusual payment withdrawal notice.* A lender must provide an unusual payment withdrawal notice in advance of initiating an unusual payment withdrawal from the consumer's account. 12 CFR 1041.9(b)(1) and (3).
3. *Consumer rights notice.* A lender must provide a consumer rights notice to a consumer if a lender has initiated two consecutive failed payment transfers from a consumer's account. 12 CFR 1041.9(c).

These disclosures may be provided electronically if the lender obtains consumer consent to electronic delivery in accordance with the Payday Lending Rule. When delivering the notices electronically through certain delivery methods, such as text message, a lender is required to provide an electronic short notice to a consumer in conjunction with the full first payment withdrawal notice, unusual payment withdrawal notice, or consumer rights notice.

General requirements for these notices, such as form and delivery requirements, are discussed in Section 5.1. The requirements specific to the first payment withdrawal notice are discussed in Section 5.2, the requirements specific to the unusual payment withdrawal notice are discussed in Section 5.3, and the requirements specific to the consumer rights notice are discussed in Section 5.4. Section 5.5 discusses electronic short notices.

The Bureau developed model forms and model clauses for these notices, which are available on the Bureau's website at <http://www.consumerfinance.gov/policy-compliance/guidance/payday-lending-rule>. Appendix A to Part 1041. Use of the model forms and model clauses is not required, but their use is deemed to be compliance with the Rule's applicable disclosure requirements (*i.e.*, provides a safe harbor). Comment 1041.9(a)(7)-1.

## 5.1 General form and delivery requirements for notices

### 5.1.1 Clear and conspicuous standard

The disclosures required under the Payday Lending Rule must be clear and conspicuous. They are clear and conspicuous if they are readily understandable and their location and type size are readily noticeable to consumers. Comment 1041.9(a)(1)-1. They may contain commonly accepted or readily understandable abbreviations. 12 CFR 1041.9(a)(1).

### 5.1.2 Written or electronic disclosures in retainable form

First payment withdrawal notices, unusual payment withdrawal notices, and consumer rights notices must be provided in writing or in electronic form. 12 CFR 1041.9(a)(2). The notices must be provided in a form that can be viewed on paper or a screen, as applicable. If the notices are provided electronically, they must use machine readable text that is accessible via both web browsers and screen readers. 12 CFR 1041.9(a)(6). Oral disclosures, such as recorded telephone messages, are not permitted. 12 CFR 1041.9(a)(2).

Generally, the notices must be in retainable form. 12 CFR 1041.9(a)(3). However, the requirement for retainable form does not apply to electronic short notices provided via a mobile application or text message. Electronic notices are in retainable form if they are in a format that permits the consumer to print, save, or email them. Comment 1041.9(a)(3)-1.

### 5.1.3 Consumer consent and electronic short notice requirements for electronic delivery

First payment withdrawal notices, unusual payment withdrawal notices, and consumer rights notices may only be provided electronically if the following consumer consent and electronic short notice requirements are satisfied:

- ☐ Electronic disclosures may be provided without regard to the consumer consent provisions of the E-Sign Act, but they must be provided in accordance with the Payday Lending Rule's electronic disclosure requirements. Comment 1041.9(a)(2)-1.



1. *Affirmative consent to a particular delivery method.* The consumer must affirmatively consent in writing or electronically to the particular electronic delivery method being used. Consumers must be permitted to select a particular electronic delivery method, and the consent must clearly show the method of electronic delivery that the lender will use. Affirmative consent to a particular delivery method can be provided by checking a box in a document during the origination process, and a lender can permit the consumer to consent to multiple methods of electronic delivery. Comment 1041.9(a)(4)(i)(A)-1.

2. *Email delivery option.* The lender must provide the consumer with the option to obtain electronic disclosures by email, separate and apart from any other electronic delivery method (e.g., mobile application, text message). A lender may choose to offer email as the only method of electronic delivery, but must offer email as a method of delivery if it offers any other method of electronic delivery. Comment 1041.9(a)(4)(i)(B)-1.

3. *Consent has not been revoked or otherwise invalidated.* Consumer consent is not valid if it is revoked or the lender receives notification that the consumer is unable to receive notices through a delivery method at the address or number the lender has used. 12 CFR 1041.9(a)(4)(ii). A consumer can revoke consent for any reason (or no reason) and by any reasonable means of communication, including calling the lender, mailing a revocation to an address the lender provides on its consumer correspondence, sending an email message, responding to a text message, or clicking on a link provided in an email from the lender. Comment 1041.9(a)(4)(ii)(A)-1. A lender receives notice that a consumer is unable to receive disclosures electronically when the lender receives any information indicating that the consumer did not receive or is unable to receive disclosures via a particular electronic delivery method. Such notice includes an email returned with notification that the consumer's email account is no longer active or does not exist, a text message returned with notification that the consumer's mobile telephone number is no longer in service, or a statement from the consumer indicating that the consumer is unable to access or review disclosures through a particular electronic delivery method. Comment 1041.9(a)(4)(ii)(B)-1.

4. *Electronic short notice, if applicable.* For electronic delivery (other than email delivery), of a first payment withdrawal notice, unusual payment withdrawal notice, or consumer rights notice, the lender must provide an appropriate electronic short notice. For email delivery, the lender may either deliver the full first payment withdrawal notice, unusual payment withdrawal notice, or consumer rights notice in the body of the email or may deliver the full notice as a linked URL webpage or PDF attachment. If the lender delivers the

full notice as a linked URL webpage or PDF attachment, it must also provide the electronic short notice at the time that it provides the URL webpage or PDF attachment of the full notice. 12 CFR 1041.9(c)(4)(iii). More information on electronic short notices is provided in Section 5.5.

## 5.1.4 Other requirements for notices

### Segregated information

Information required to be included in the notices must be segregated from all other materials. The notices must contain only the information required by 12 CFR 1041.9 of the Payday Lending Rule, although information necessary for product identification, branding, and navigation (as applicable) may be included. Additional content must not be displayed above, below, or around the required content. 12 CFR 1041.9(a)(5). Additional content may be delivered through a separate form, such as a separate piece of paper or webpage. Comment 1041.9(a)(5)-1.

### Foreign language disclosures allowed

The notices may be made in a language other than English provided that they are also available in English upon the consumer's request. 12 CFR 1041.9(a)(8).

### Content, order, format, and safe harbor for model forms and clauses

The content, order, and format of the notices must be substantially similar to the applicable model form or model clause. The first payment withdrawal notice must be substantially similar to Model Form A-3, and the unusual payment withdrawal notice must be substantially similar to Model Form A-4. The consumer rights notice must be substantially similar to Model Form A-5. The electronic short payment notice must be substantially similar to Model Clause A-6 or A-7, as applicable. The electronic short consumer rights notice must be substantially similar to Model Clause A-8. 12 CFR 1041.9(a)(7). Model forms and model clauses are available on the Bureau's website at <http://www.consumerfinance.gov/policy-compliance/guidance/payday-lending-rule>. Use of the model forms and model clauses is not required, but their use is deemed to be compliance with the Rule's applicable disclosure requirements (*i.e.*, provides a safe harbor).

Comment 1041.9(a)(7)-1. Content and timing requirements specific to each notice are discussed below.

## 5.2 First payment withdrawal notices

A lender must provide a consumer with a first payment withdrawal notice that complies with the Payday Lending Rule's requirements before initiating a first payment withdrawal from the consumer's account.

### 5.2.1 First payment withdrawal

The first payment withdrawal is the first payment transfer scheduled to be initiated by a lender for a particular covered loan. If a transfer is not a "payment transfer" as defined in the Rule, the withdrawal is not a first payment withdrawal. For example, certain transfers initiated by a lender that is the institution that holds the consumer's account are not payment transfers. More information on which transfers are payment transfers under the Rule is available in Sections 4.1 and 4.2.

☞ If a lender initiates a payment pursuant to a consumer's authorization and the consumer later changes the authorization or provides an additional authorization, the lender's initiation of a payment pursuant to the new or updated authorization would not be a first payment withdrawal. However, it may be an unusual payment withdrawal. Comment 1041.9(b)(1)(i)-1. See Section 5.3 for information regarding unusual payment withdrawals.

Because the first transfer to make a payment on a covered loan may not be a payment transfer (as that term is defined in the Payday Lending Rule), it is possible that the first payment withdrawal will not be the transfer to make the first payment. Additionally, there may be situations where a loan (*e.g.*, a covered longer-term loan) is not covered at the time of origination but becomes covered at a later date. The lender's first attempt to execute a payment transfer after the loan becomes a covered loan is the first payment withdrawal. Comment 1041.9(b)(1)(i)-2.

A lender is not required to provide a first payment withdrawal notice when the lender initiates a single immediate payment transfer at the consumer's request or for the initial payment transfer after there have been two consecutive failures and the lender obtains the consumer's new and

specific authorization according to 12 CFR 1041.8(c), even if the payment transfer otherwise is a first payment withdrawal. 12 CFR 1041.9(b)(1)(iii).

## 5.2.2 Timing for providing the first payment withdrawal notice

The lender must provide the first payment withdrawal notice no earlier than when the lender obtains any type of payment authorization from the consumer and no later than the following:

1. *For delivery by mail:* six business days prior to initiating the first payment withdrawal. The six business day period begins when the lender places the notice in the mail.  
Comment 1041.9(b)(2)(i)(A)-1.
2. *For electronic delivery:* three business days prior to initiating the first payment withdrawal. The three business day period begins when the lender sends the notice.  
Comment 1041.9(b)(2)(i)(B)(1)-1.
3. *In person delivery:* three business day prior to initiating the first payment withdrawal.

☞ The lender has flexibility to provide the first payment withdrawal notice at origination or closer to the withdrawal date. If a lender obtains a payment authorization during the origination process, the lender may provide the first payment withdrawal notice at the time that the lender provides the consumer with a copy of the completed payment authorization. Comments 1041.9(b)(1)(i)-1 and .9(b)(2)(i)-1.

12 CFR 1041.9(b)(2)(i).

If, after providing the first payment withdrawal notice through electronic delivery, the consumer revokes consent to electronic delivery or the lender loses the consumer's consent to electronic delivery through a particular method, the lender may initiate the payment transfer for the payment currently due as scheduled. If the lender is scheduled to make a future unusual payment withdrawal attempt following the one that was disclosed in the previously provided first withdrawal notice, the lender must provide notice for that unusual payment withdrawal through alternate means, in accordance with the applicable requirements discussed in Section 5.3. Comment 1041.9(b)(2)(i)(B)(2)-1.

### 5.2.3 Content for first payment withdrawal notice

The first payment withdrawal notice must contain the following information and statements, using language substantially similar to the language in Model Form A-3:

1. *An identifying statement.* The identifying statement must include the phrase “Upcoming Withdrawal Notice” along with the name of the lender providing the notice. If the lender is providing the notice via email, the identifying statement must be in the email’s subject line and the body of the email. Comment 1041.9(b)(4)(ii)(A)-1.
2. *The date the lender will initiate the payment transfer.* This date is the date that the payment transfer is sent outside of the lender’s control (*i.e.*, the date that the lender or its agent sends the payment to be processed by a third party). For example, if a lender sends its ACH payments to a payment processor acting on its behalf on June 1, but the payment processor does not submit them to its bank and the ACH network until June 2, the date of the payment transfer is June 2. Comment 1041.9(b)(2)(ii)(B)(1)-1.
3. *The dollar amount of the payment transfer.* This amount is the total amount of money that will be transferred from the consumer’s account, regardless of whether that total corresponds to the amount of the regularly scheduled payment. For example, if a lender initiates a single transfer to collect a regularly scheduled payment of \$50 and a late fee of \$30, the dollar amount of the payment transfer that must be disclosed is \$80. Comment 1041.9(b)(2)(ii)(B)(2).
4. *Sufficient information to permit the consumer to identify the account from which the funds will be transferred.* The lender may not use the full account number, but may use a truncated account number.
5. *Sufficient information to permit the consumer to identify the covered loan associated with the payment transfer.*

6. *The payment channel for the payment transfer.* The payment channel is the specific payment method, including the network and the form of the payment transfer. For example, a lender that uses a paper check to initiate a transfer through the ACH network discloses the ACH payment channel. A lender that uses consumer account and routing information to initiate a remotely created check sent over the check network discloses the remotely created check payment channel. A lender that uses a post-dated signature check to initiate a transfer over the check network uses the signature check payment channel. A lender that initiates a payment from a consumer’s prepaid card account specifies whether the payment is processed as an ACH transfer, PIN debit card network payment, or a signature debit card network payment. Other commonly used payment channels include checks, remotely created payment orders, and internal transfers. Comments 1041.9(b)(2)(ii)(B)(5)-1 and -2.

☐ For purposes of disclosing the payment channel, common payment channel descriptions include, but are not limited to, ACH transfers, checks, remotely created checks, remotely created payment orders, internal transfers (at a financial institution that also holds a consumer’s account), PIN debit card payments, and signature debit card network payments.

7. *Check number.* The lender discloses the check number associated with the payment transfer if the transfer will be initiated by a signature or paper check, remotely created check, or remotely created payment order.

8. *Table.* The following information is included, as applicable, in a tabular form:

- a. A heading that says “Payment Breakdown”;
- b. The amount of the payment that will be applied to principal (if the amount that will be applied to principal is zero, disclose \$0.);
- c. The amount of the payment that will be applied to accrued interest;
- d. The amount of the payment that will be applied to fees (if the amount that will be applied to fees is zero do not include this item; if the payment will be applied to multiple fees, fees may be disclosed separately or aggregated);
- e. The amount of the payment that will be applied to other charges (if the amount that will be applied to other charges is zero, do not include this item; if the payment will be applied to multiple other charges, the charges may be disclosed separately or aggregated);

- f. A statement that says “Total Payment Amount” (using that phrase), and includes the total dollar amount of the payment; and
  - g. A statement explaining that the payment will not reduce principal (if applicable), using the appropriate one of the two following phrases:
    - “When you make this payment, your principal balance will stay the same and you will not be closer to paying off your loan.”
    - “When you make this payment, your principal balance will increase and you will not be closer to paying off your loan.”
9. *Lender’s contact information.* The notice must include the lender’s name, the name under which the payment transfer will be initiated (if different than the consumer-facing name of the lender), and two different forms of lender contact information that the consumer may use to obtain information about the covered loan.

12 CFR 1041.9(b)(2)(ii).

## 5.3 Unusual payment withdrawal notices

A lender must provide a consumer with an unusual payment withdrawal notice that complies with the Payday Lending Rule’s requirements before initiating an unusual payment withdrawal from the consumer’s account.

### 5.3.1 Unusual payment withdrawal

An unusual payment withdrawal is a payment transfer that meets one or more of the following:

1. Varies in amount from the regularly scheduled payment amount;
2. Has a payment transfer date that is not a date on which a regularly scheduled payment is due under the terms of the loan agreement;
3. Is initiated through a payment channel that is different from the payment channel of the immediately prior transfer; or
4. Is for the purpose of re-initiating a returned transfer.

12 CFR 1041.9(b)(3)(ii)(C).

**Example:** Willow Lender provides a first payment withdrawal notice to a consumer at the time that it originates a covered loan to the consumer. On March 1, Willow Lender initiates the first payment withdrawal for \$75, as a paper check. The second payment in the amount of \$75 is scheduled to occur on April 1, as an ACH transfer. Before initiating the second payment, Willow Lender must provide an unusual payment withdrawal notice because the second payment is being initiated through a different payment channel than the first payment.

A lender is not required to provide an unusual payment withdrawal notice when the lender initiates a single immediate payment transfer at the consumer's request or for the initial payment transfer after there have been two consecutive failures and the lender obtains the consumer's new and specific authorization according to 12 CFR 1041.8(c), even if the payment transfer otherwise is an unusual payment withdrawal. 12 CFR 1041.9(b)(1)(iii).

### 5.3.2 Timing for providing unusual payment withdrawal notices

The lender must provide an unusual payment withdrawal notice:

1. *For delivery by mail:* no earlier than ten business days and no later than six business days prior to initiating the unusual payment withdrawal.
2. *For electronic delivery:* no earlier than seven business days and no later than three business days prior to initiating the unusual payment withdrawal.
3. *In person delivery:* no earlier than seven business days and no later than three business day prior to initiating the unusual payment withdrawal.

12 CFR 1041.9(b)(2)(i).

If, after providing the first payment withdrawal notice or an unusual payment withdrawal notice through electronic delivery, the consumer revokes consent to electronic delivery or the lender loses the consumer's consent to electronic delivery through a particular method, the lender must provide notice of any future unusual payment withdrawal through alternative means. 12 CFR 1041.9(b)(2)(i)(B)(2) and .9(b)(3)(i)(B)(2).



For a covered loan that is open-end credit, the lender may provide the unusual payment withdrawal notice in conjunction with the periodic statement required under Regulation Z, 12 CFR 1026.7(b), and in accordance with the timing requirements in that section of Regulation Z, 12 CFR 1041.9(b)(3)(i)(D).

### 5.3.3 Content for unusual payment withdrawal notices

The unusual payment withdrawal notice must contain the following information and statements, using language substantially similar to the language in Model Form A-4:

1. *An identifying statement.* The identifying statement must include the phrase “Alert: Unusual Withdrawal” along with the name of lender providing the notice. If the lender is providing the notice via email, the identifying statement must be in the email’s subject line and the body of the email. Comment 1041.9(b)(4)(ii)(A)-1.
2. *The date the lender will initiate the payment transfer.*
3. *The dollar amount of the payment transfer.*
4. *Sufficient information to permit the consumer to identify the account from which the funds will be transferred.* The lender may not use the full account number, but may use a truncated account number.
5. *Sufficient information to permit the consumer to identify the covered loan associated with the payment transfer.*
6. *The payment channel for the payment transfer.*
7. *Check number.* A lender discloses the check number associated with the payment transfer if the transfer will be initiated by a signature or paper check, remotely created check, or remotely created payment order.
8. *Table.* The following information is disclosed in a tabular form:
  - a. A heading that says “Payment Breakdown”;
  - b. The amount of the payment that will be applied to principal;
  - c. The amount of the payment that will be applied to accrued interest;
  - d. The amount of the payment that will be applied to fees (if applicable);

- e. The amount of the payment that will be applied to other charges (if applicable);
- f. A statement that says “Total Payment Amount” (using that phrase), and includes the total dollar amount of the payment; and
- g. A statement explaining that the payment will not reduce principal (if applicable), using the appropriate one of the two following phrases:
  - “When you make this payment, your principal balance will stay the same and you will not be closer to paying off your loan.”
  - “When you make this payment, your principal balance will increase and you will not be closer to payment off your loan.”

9. *Lender’s contact information.* The lender’s contact information is the lender’s name, the name under which the payment transfer will be initiated (if different than the consumer-facing name of the lender), and two different forms of lender contact information that the consumer may use to obtain information about the covered loan.

10. *Description of unusual withdrawal.* The unusual withdrawal notice must contain a statement explaining what makes the withdrawal unusual, as applicable:

a. *If the amount varies:* A statement that the transfer will be for a larger or smaller amount (as applicable) than the regularly scheduled payment. This statement is disclosed if the amount of a transfer will vary in amount from the regularly scheduled payment amount. For example, this requirement may apply to a covered loan that is closed-end credit when the lender seeks to collect a late fee. If the payment transfer is for a covered loan that is open-end credit, this statement is only required if the amount deviates from the scheduled minimum payment as disclosed in the periodic statement required under Regulation Z, 12 CFR 1026.7(b). See comment 1041.9(b)(3)(ii)(C)-3 for additional examples.

b. *If the payment date differs:* A statement that the transfer will be initiated on a date other than the date of a regularly scheduled payment. This statement is disclosed if the payment transfer date is not a date on which a regularly scheduled payment is due under the terms of the loan agreement. For example, this requirement may apply when the lender initiates a one-time electronic payment transfer to collect a late fee. See comment 1041.9(b)(3)(ii)(C)-4 for additional examples.

c. *If the payment channel differs*: A statement that the transfer will be initiated through a different payment channel and a statement of the payment channel used for the prior transfer. These statements are disclosed if the payment channel for the payment transfer will differ from the payment channel of the payment transfer immediately before the payment transfer identified in the notice.

d. *For a reinitiated transfer*: A statement of the date and amount of the previously unsuccessful attempt, and a statement of the reason for the return. If the transfer is for the purpose of re-initiating a returned transfer, a statement that the lender is re-initiating a returned transfer, a statement of the date and amount of the previous unsuccessful attempt, and a statement of the reason for the return.

12 CFR 1041.9(b)(3)(ii).

**Example:** On March 1, Willow Lender initiates an ACH transfer for a first payment withdrawal in the amount of \$75. The second payment in the amount of \$75 is scheduled to occur on April 1. Willow Lender will initiate this second payment using a post-dated signature check to initiate a transfer over the check network. Before initiating the second payment, Willow Lender provides an unusual payment withdrawal notice that states that the withdrawal will be made by the signature check payment channel, that the payment is unusual because the payment channel used to initiate the payment is different than the originally scheduled payment, and that the previous withdrawal was initiated on March 1 via an ACH transfer. Because the amount did not vary, the payment is taking place on the regularly scheduled date, and this is not a re-initiated payment, Willow Lender has satisfied the requirement to explain what makes the withdrawal unusual.

## 5.4 Consumer rights notices

After a lender initiates two consecutive failed payment transfers from a consumer's account as discussed in Section 4, the lender must provide the consumer with a consumer rights notice. This notice must be provided before a lender can obtain a new and specific authorization, as explained in Section 4.4.

The lender must send the notice no later than three business days after receiving information that the second consecutive attempt has failed. 12 CFR 1041.9(c)(2). Any information provided to the lender or its agent that the second payment transfer has failed triggers the timing requirement. Comment 1041.9(c)(2)-1.

The consumer rights notice must contain the following information and statements using language substantially similar to Model Form A-5:

1. A statement that the lender, identified by name, is no longer permitted to withdraw loan payments from the consumer's account.
2. A statement that the lender's last two attempts to withdraw payment from the consumer's account were returned due to non-sufficient funds or that the payments initiated by the consumer's account-holding institution caused the account to go into overdraft status (as applicable).
3. Sufficient information to permit the consumer to identify the account from which the unsuccessful attempts were made. The lender cannot provide a full account number, but may provide a truncated number.
4. Sufficient information to permit the consumer to identify any covered loan associated with the unsuccessful attempts.
5. A statement that in order to protect the consumer's account, federal law prohibits the lender from initiating further payment transfers without the consumer's permission (using that phrase).
6. A statement that the lender may be in contact with the consumer about payment choices going forward.
7. The following information in a tabular form:
  - a. A heading with the statement "previous payment attempts";
  - b. The scheduled due date of each previous unsuccessful payment transfer the lender attempted;
  - c. The date of each previously unsuccessful payment transfer the lender initiated;
  - d. The amount of each previously unsuccessful payment transfer the lender initiated;and

- e. The fees the lender charged for each unsuccessful payment attempt (if applicable) with an indication that the lender charged the fees. If the lender also is the institution that holds the consumer's account, the fees must include all fees charged in connection with the transfer, including returned payment fees, overdraft fees, and insufficient funds fees. Comment 1041.9(c)(3)-2.
8. A statement that the Consumer Financial Protection Bureau created the notice (using that phrase), and a statement that the CFPB is a federal government agency along with the URL to [www.cfpb.gov/payday](http://www.cfpb.gov/payday). This statement (along with the URL) must be the last piece of information in the notice.

## 5.5 Electronic short notices

### 5.5.1 First payment withdrawal and unusual payment withdrawal notices

If the lender provides a first payment withdrawal notice or an unusual payment withdrawal notice through electronic delivery (other than email delivery when the full notice appears in the body of the email), it must also provide an electronic short notice. The electronic short notice must contain the following information and statements in a form substantially similar to Model Clause A-6 or Model Clause A-7, as applicable:

1. For a first payment withdrawal notice, the statement “Upcoming Withdrawal Notice” along with the name of lender providing the notice;
2. For an unusual payment withdrawal notice, the statement “Alert: Unusual Withdrawal” along with the name of lender providing the notice;
3. The date the lender will initiate the payment transfer;
4. The dollar amount of the payment transfer;
5. Sufficient information to permit the consumer to identify the account from which the funds will be transferred. The lender may not use the full account number, but may use a truncated account number;

6. If the full notice is being provided through a linked URL (rather than as a PDF attachment), the unique URL of a website that the consumer may use to access the full payment notice;

7. For unusual withdrawal notices, the following information and statements, as applicable, using language substantially similar to the Model Clause A-7:

a. If the amount of a transfer will vary in amount from the regularly scheduled payment amount, a statement that the transfer will be for a larger or smaller amount (as applicable) than the regularly scheduled payment. If the payment transfer is for a covered loan that is open-end credit, this statement is only required if the amount deviates from the scheduled minimum payment as disclosed in the periodic statement required under Regulation Z, 12 CFR 1026.7(b).

b. If the payment transfer date is not a date on which a regularly scheduled payment is due under the terms of the loan agreement, a statement that the transfer will be initiated on a date other than the date of a regularly scheduled payment.

c. If the payment channel for the transfer will differ from the payment channel of the transfer immediately before it, a statement that the transfer will be initiated through a different payment channel and a statement of the payment channel used for the prior transfer.

12 CFR 1041.9(b)(4)(ii).

## 5.5.2 Consumer rights notice

If the lender provides a consumer rights notice through electronic delivery (other than email delivery when the full consumer rights notice appears in the body of the email), it must also provide an electronic short notice. The electronic short notice must contain the following information and statements in a form substantially similar to Model Clause A-8:

1. A statement that the lender, identified by name, is no longer permitted to withdraw loan payments from the consumer's account.
2. A statement that the lender's last two attempts to withdraw payments from the consumer's account were returned due to non-sufficient funds or that the payments

initiated by the consumer's account-holding institution caused the account to go into overdraft status (as applicable).

3. Sufficient information to permit the consumer to identify the account from which the unsuccessful attempts were made. The lender cannot provide a full account number, but may provide a truncated number.
4. The statement that in order to protect the consumer's account, federal law prohibits the lender from initiating further payment transfers without the consumer's permission (using that phrase).
5. If the full notice is being provided through a linked URL (rather than as a PDF attachment), the unique URL of a website that the consumer may use to access the full payment notice.

12 CFR 1041.9(c)(4)(ii)(A).

# 6. Compliance program and record retention

## 6.1 Compliance program

A lender making a covered loan must develop and follow written policies and procedures that are reasonably designed to ensure compliance with the Payday Lending Rule. These written policies and procedures must be appropriate to the size and complexity of the lender and its affiliates and the nature and scope of the covered loans and lending activity of the lender and its affiliates. 12 CFR 1041.12(a). The policies and procedures must provide guidance to a lender's employees on how to comply with the Payday Lending Rule for the covered loans that the lender originates.

## 6.2 Record retention

A lender must retain evidence of compliance with the Payday Lending Rule for thirty-six months after the date on which a covered loan ceases to be an outstanding loan.<sup>14</sup> 12 CFR 1041.12(b). A summary of the specific record retention requirements related to the Rule's payment provisions is below.

For each covered loan, the lender must retain or be able to reproduce an image of the following documentation, as applicable: (1) leveraged payment mechanisms the lender obtained from the consumer; (2) authorizations of additional payment transfers; and (3) underlying one-time

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<sup>14</sup> A covered loan ceases to be an outstanding loan as of the earliest of the date that: (a) the consumer repays the loan in full; (b) the consumer is released from the legal obligation to repay the loan; (c) the loan is legally discharged; or (d) is the 180th day following the consumer's last payment of any amount on the loan (*i.e.*, includes payments that are not on a scheduled date or in a scheduled amount). Comment 1041.2(a)(17)-2.



electronic transaction authorizations or underlying signature checks. 12 CFR 1041.12(b)(4).<sup>15</sup> The lender must either retain the original or be able to accurately reproduce an image of such documents. For documentation the lender received electronically, the lender may retain either the electronic version or a printout. Comment 1041.12(b)(4)-1.

Additionally, the lender must retain electronic records in tabular format that include the following information:

1. History of payments received and attempted payment transfers. This history must include the date of receipt of the payment or attempted payment transfer, the amount of the payment due, the amount of the attempted payment transfer, the amount of the payment received or transferred, and the payment channel used for an attempted payment transfer.
  2. If an attempt to transfer funds from a consumer's account is subject to the prohibition in 12 CFR 1041.8(b)(1), whether the lender or service provider obtained an authorization to initiate a payment transfer in accordance with 12 CFR 1041.8(c) or (d).
- ☞ Tabular format means a format in which the individual data elements comprising the record can be transmitted, analyzed, and processed by a computer program (*e.g.*, a widely used spreadsheet or databased program). Data formats, such as PDF, and document formats used by word processing programs are not tabular formats. A lender does not have to retain all of its records in a single, combined spreadsheet or database. However, the lender must be able to associate the records for a particular covered loan with its unique loan and consumer identifiers. Comments 1041.12(b)(2)-1, (b)(3)-1, and (b)(5)-1.

12 CFR 1041.12(b)(5).

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<sup>15</sup> Beginning on November 19, 2020, the lender must also retain or be able to reproduce an image of the loan agreement for covered short-term loans and covered longer-term balloon-payment loans. 12 CFR 1041.12(b)(1). If proposed changes to the Rule are adopted, the Rule will expressly require lenders to retain the loan agreement for all covered loans. See 84 Fed. Reg. 4252, 4280 (Feb. 14, 2019).

## 6.3 Prohibition on evasion

A lender must not take any action with the intent of evading the requirements of the Payday Lending Rule's record retention or compliance program requirements. 12 CFR 1041.13.

The actual substance of the lender's action as well as other relevant facts and circumstances will determine whether the lender's action was taken with the intent of evading the requirements. If the lender's action is taken solely for legitimate business purposes, it is not taken with the intent of evading the requirements. However, if a consideration of all relevant facts and circumstances reveals the presence of a purpose that is not a legitimate business purpose, the lender's action may have been taken with the intent of evading the requirements. A lender action that is taken with the intent of evading the requirements may be knowing or reckless. Fraud, deceit, or other unlawful or illegitimate activity may be one fact or circumstance relevant to a determination of whether a lender's action was taken with the intent of evading the requirements, but fraud, deceit, or other unlawful or illegitimate activity is not a prerequisite. Comment 1041.13-1.