

AMERICAN FINANCIAL SERVICES ASSOCIATION
LAW COMMITTEE
PERSONAL LOAN COMMITTEE
REPORT ON RECENT DEVELOPMENTS
MAY 20-22, 2019

1. CFPB Proposed Revised Rule on Payday, Vehicle Title, and Certain High Cost Installment Loans

The revised CFPB Rule on Payday, Vehicle Title, and Certain High Cost Installment Loans (the “Revised Payday Lending Rule” or the “Revised Rule”) was published in the Federal Register on February 6th.¹ The Revised Rule removes the “mandatory underwriting provisions” of the earlier final CFPB Rule on Payday, Vehicle Title, and Certain High Cost Installment Loans (the “Original Payday Lending Rule” or the “Original Rule”) that defined an unfair and abusive practice to include a failure to consider the borrower’s ability to repay a covered loan. The Revised Payday Lending Rule also eliminates sections of the Original Rule requiring lenders to furnish information to registered information systems.

The Revised Rule does not remove any of the “payment provisions” from the Original Payday Lending Rule that include certain practices with respect to a “leveraged payment mechanism” within the scope of an unfair and abusive practice. These payment provisions (along with the other various record retention and compliance requirements of the Original Rule), remain in what became an effective regulation on January 16, 2018, with a compliance date of August 19, 2019 that is currently stayed pursuant to the court order issued in *Community Financial Services Association v. CFPB*, No. 1:18-cv-00295 (W.D. Tex. Nov. 6, 2018). The CFPB issued a Small Entity Compliance Guide for the payment related provisions of the Original Payday Lending Rule on February 20th that provides helpful guidance for compliance if, and when lenders have to comply. This compliance guide is available at:

https://files.consumerfinance.gov/f/documents/cfpb_payday_small-entity-compliance-guide.pdf

Preliminary AFSA Member Questions:

1. The Model Notice (First Payment Transfer) has a payment breakdown of principal and interest. This isn’t really applicable for a precomputed loan that refunds using the Rule of 78s. How should we structure this?
2. Regarding Unusual Payment Transfer Notices: what if the *consumer* requests a different amount, different date, etc. Is the notice still required?
 - a. Customer is enrolled in a recurring remotely created check program and has authorized checks to be processed on the 10th of each month. Customer calls Lender on the 9th and requests that the check be processed on the 11th.

¹ The CFPB also published a second Proposed Rule to delay the compliance date for the to be deleted provisions of the Original Rule related to mandatory underwriting, and information systems.

i. when Lender processes the check on the 11th, does this transaction fall within the “Single Immediate Payment Transfer at a Consumer’s Request (“SIPT”) exception, and therefore Lender would not be obligated to send an Unusual Payment Withdrawal notice?

ii. can Lender set up an ACH instead if a customer calls and requests delay in check processing?

b. Customer is enrolled in recurring debit payment program. Customer logs into online account and changes the payment date without Lender’s intervention (or even knowledge), does this situation require a notice prior to the newly scheduled debit payment?

3. Is this a reasonable interpretation of the mechanics of the SIPT exception: The definition of a SIPT is (i) A payment transfer initiated by 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 (ii) A payment transfer initiated by means of processing the consumer's signature check through the check system or through the ACH system within one business day after the consumer provides the check to the Lender. (12 CFR § 1041.8(a)(2)). The customer requested and authorized a payment transfer for the 11th therefore as long as Lender processes the check or initiates the EFT within 1 business day from the 11th, the transaction falls within the SIPT exception. The timing of the SIPT (i.e. the “1 business day” between the date authorization and processing/initiating should be triggered on the date of authorization, not necessarily the date that Lender actually speaks to the customer – if those two dates are different.

4. On p. 1670, comment 9(b)(2)(i)(B) Electronic Delivery states that “the three-business-day period begins when the Lender sends the notice, not when the consumer receives or is deemed to have received the notice. EX: notice sent 6/1, OK to initiate transfer on 6/4. Does this apply to sending all of the notices? The comment is directly related to the Payment Transfer notice; does it apply to the Unusual Withdrawal notice? Consumer Rights notice?

5. For Leveraged Payment Mechanisms, who is the Lender in the context of the SIPT? Strictly the Lender? Or the Lender’s agent too? I am asking this question to get a feel for exactly what needs to take place within 1 business day of obtaining the customer’s consent (i.e. Is it enough for Lender to send the request for the transfer to its payment processor, or does the payment process have to actually send the payment out for processing within the 1 business day?)

6. Are failed debit transactions considered a 1st failed payment transfer?

7. Re: Record Retention: the Rule states that we need to be able to reproduce an image of the LPM obtained? If the LPM is obtained orally with recorded documentation, does this still apply?

8. Re Record Retention: Is Lender only responsible to retain the documents in 12 CFR § 1041.12 (b)(4)?

9. Regarding First Payment Withdrawal Notice:

a. Customer calls Lender's branch on the 5th and informs Lender that he/she will be working off-shore for the next three weeks. Knowing that his/her payment is due on the 7th and that he/she will be unable to make the payment, Customer asks Lender to withdraw funds on the 7th. Lender sets up a post-dated ACH payment to occur on the 7th. Lender initiates the payment transfer within 1 business day of the 7th. Does this transaction fall within the SIPT exception? If not, how does Lender satisfy the First Payment Withdrawal Notice requirement (must be sent 3 days prior to initiation of payment transfer if Lender has obtained e-mail consent. What if post-dated ACH payment is set up inside 6 days? The First Payment Withdrawal Notice must be sent at least 6 days prior to the payment transfer for snail mail.

10. How will BK payments through trustee be treated? Other recurring payments? Debt Settlement Agencies? Recurring A&H payments or IUI payments?

11. After two consecutive failed payments and obtaining Special Authorization, does that reset the failed payment transfer count to zero? Is a First Payment Withdrawal Notice necessary prior to the first payment transfer after obtaining Special Authorization?

12. Is a Business Day defined in the Rule?

13. If we have a failed payment transfer and then initiate a single immediate payment transfer at the consumer's request and that payment fails, is that considered the second failed payment transfer or is the entire transaction (even the failed payment) excepted from the notice requirements?

2. Federal Trade Commission Proposed Rule to Amend the Standards for Safeguarding Customer Information Rule

On August 29, 2016 the Federal Trade Commission ("FTC" or the "Commission") asked for general comments on the Standards for Safeguarding Customer Information (the "Safeguards Rule" or the "Rule") as part of its periodic review process, and posed five specific questions for consideration:

1. Should the Commission add more specific requirements for information security programs to the Rule?
2. Should the Rule require the inclusion of an incident response plan?
3. Should the Rule reference or incorporate any other information security standards or framework, such as the National Institute of Standards and Technology's Cybersecurity Framework or the Payment Card Industry Data Security Standard?

4. Should the Rule contain its own definition of the term “financial institution” or continue to cross-reference the definition contained in the Privacy Rule?
5. Should the definition of the term “financial institution” be expanded?

The Commission published their proposed rule (the “Proposed Rule”) to amend the Safeguards Rule on March 5, 2019.

The Proposed Rule:

- Provides for specific elements required in any information security program, including:
 - Identification of a Chief Information Security Officer (“CISO”) responsible for implementing and overseeing the information security system
 - A risk assessment that identifies reasonably foreseeable internal and external risks, and an assessment of the sufficiency of existing safeguards in place to address these risks. While a risk assessment is required by the existing Rule, the Proposed Rule requires specific elements be satisfied as part of that risk assessment, including:
 - A written risk assessment that includes:
 - Criteria for the evaluation and categorization of security threats faced;
 - Criteria for the assessment of the confidentiality, integrity, and availability of your information systems and customer information, including the adequacy of the existing controls in the context of the identified risks or threats faced; and
 - Requirements describing how identified risks will be mitigated or accepted based on the risk assessment and how the information security program will address those risks.
 - Periodic additional risk assessments to reexamine reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of the customer information that could result in the unauthorized disclosure, misuse, alteration, destruction or other compromise of the information, a reassess the sufficiency of any safeguards in place to control those risks
 - Design and implement safeguards to control the risks you identify through the risk assessment, including:
 - Placing access controls on information systems to protect against unauthorized acquisition of customer information;
 - Identifying and managing the data, personnel, devices, systems and facilities that allow you to achieve business purposes in accordance with their importance to business objectives and risk strategy;
 - Restricting access at physical locations containing customer information to only authorized individuals;
 - Protecting all information “held or transmitted” by encryption;

- Adopting secure development practices for in-house developed applications used to access, store or transmit customer information;
- Implementing multi-factor authentication for any individual accessing customer information;
- Including audit trails within the information security program to detect and respond to security events;
- Developing procedures for secure disposal of customer information;
- Adopting procedures for change management; and
- Implementing policies, procedures and controls designed to monitor the activity of authorized users and detect unauthorized access or use of, or tampering with customer information.
- Regularly test or otherwise monitor the effectiveness of the safeguards' key controls, systems and procedures, including those to detect actual and attempted attacks on, or intrusions into, information systems
- Implement policies and procedures to ensure personnel can implement the information security program
- Oversee service providers by:
 - Taking reasonable steps to select appropriate and capable providers;
 - Requiring service providers by contract to implement and maintain the required safeguards; and
 - Periodically assessing the adequacy of the safeguards employed by service providers.
- Evaluate and adjust your information security program in light of the results of the testing and monitoring required by the Proposed Rule
- Establish a written incident response plan to promptly respond to, and recover from any security event materially affecting the confidentiality, integrity or availability of customer information in your possession;
- Annual reporting by the CISO to the company Board of Directors.
- Incorporates the definition of financial institution into the Safeguards Rule itself, as opposed to relying on a cross reference to the Privacy Rule; and
- Expands the definition of the term “financial institution” to include companies engaged in activities considered incidental to financial activities after 1999.

AFSA is one of only a handful of commenters to the Proposed Rule to date.

<https://www.regulations.gov/document?D=FTC-2019-0019-0010>

3. Prescreened Solicitations

The Unsolicited Loan Act of 2018 – returning in 2019?

<https://www.congress.gov/bill/115th-congress/senate-bill/3734/text>

4. Electronic Loan Funding

5. DOXO – “Payment Processor”

