V. Payday Lending and Its Regulation

A. Introduction

In July 2016, the Consumer Financial Protection Bureau (CFPB) proposed a rule to create consumer protections for certain consumer credit products, including payday loans.[1] While many states have already enacted regulation to curtail or prohibit payday lending, the CFPB's proposed rule is the first federal regulation directly aimed at payday lending.[2] As described by the CFPB, "[a] payday loan is a short-term loan, often for $500 or less, that is typically due on [a borrower's] next payday."[3] Marketed as an easily accessible financial option "intended to cover small, often unexpected expenses,"[4] payday loans tend to be obtained by borrowers with impaired credit histories who lack other means of securing funds.[5] The CFPB's proposed rule comes in the wake of a now longstanding debate as to whether payday loans are beneficial to consumers.[6] On the one hand, payday loans

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[1] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47,864, 47,864 (proposed July 22, 2016) (to be codified at 12 C.F.R. pt. 1041).

[2] *See* Yuka Hayashi, *U.S. to Curb Payday Lenders*, WALL ST. J. (June 2, 2016), http://www.wsj.com/articles/u-s-to-curb-payday-lenders-1464840063?mg=id- [https://perma.cc/8F8M-9FHH] [hereinafter *U.S. to Curb Payday Lenders*] ("The Obama administration will announce Thursday the federal government's first move to regulate high-interest, low-dollar 'payday loans,' a $38.5 billion market currently left to the states."); Yuka Hayashi, *Payday Lending: Some States Think They Have Answer*, WALL ST. J. (Mar. 16, 2016), http://www.wsj.com/articles/payday-lending-some-states-think-they-have-answer-1458120604 [https://perma.cc/47PD-V4B4] [hereinafter *Payday Lending*].

[3] David Silberman, *We've proposed a rule to protect consumers from payday debt traps*, CONSUMER FIN. PROTECTION BUREAU (June 2, 2016), http://www.consumerfinance.gov/about-us/blog/weve-proposed-rule-protect-consumers-payday-debt-traps/ [https://perma.cc/TCV3-CZFR].

[4] *What is a payday advance?*, CMTY. FIN. SERV. ASS'N OF AM., http://cfsaa.com/what-is-a-payday-advance.aspx [https://perma.cc/7CUB-5Q6G].

[5] *See* Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 857 (2007).

[6] *See*, *e.g.*, Alex Kaufman, *Payday Lending Regulation* 2 (Fin. & Econ. Discussion Series, Working Paper No. 62, 2013), https://www.federalreserve.gov/pubs/feds/2013/201362/201362pap.pdf [https://perma.cc/MWE8-58CM].

serve as a credit option for consumers who have limited access to financing. On the other, there is a propensity for payday loan borrowers to accumulate additional debt through repeat borrowing with the continued inability to pay, giving rise to what industry critics refer to as a "debt trap."[7] Advocates of payday loans emphasize the importance of preserving the availability of credit options for credit-impaired consumers through limited regulation.[8] However, the CFPB and opponents to payday lending argue that the onerous terms of payday loans and the harmful impact to consumers caused by continuous cycles of debt necessitate consumer protection regulation, notwithstanding the impact of regulation on consumers' access to lending.[9] The CFPB's proposed regulation attempts to protect consumers from the predatory practices and potential abuses created by payday lending without eliminating payday loans altogether.[10]

This article discusses the structure of payday loans and their potentially problematic features, current regulation of payday lending, and, specifically, the CFPB's proposed rule to regulate payday loans and impose certain requirements and restrictions on payday lenders. First, Section B provides an overview of payday loans and the ways in which such loans can lead borrowers into a "debt trap." Second, Section C discusses some examples of current state regulation of payday loans as well as consumer advocacy responses to payday lending and its regulation. Third, Section D provides an overview of the CFPB's proposed rule. Finally, Section E highlights criticism and concerns regarding the CFPB's proposed rule.

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[7] *See* Scott Horsley & Chris Arnold, *New Rules To Ban Payday Lending 'Debt Traps,'* NPR (June 2, 2016), http://www.npr.org/sections/thetwo-way/2016/06/02/480329986/new-rules-to-ban-payday-lending-debt-traps [https://perma.cc/6G2P-CN3K].

[8] *See CFPB Rule A Staggering Blow to Consumers*, CMT. FIN SERV. ASS'N OF AM. (June 1, 2016), http://cfsaa.com/our-resources/communications/recent-news/article-detail.aspx?newsid=130 [https://perma.cc/5KD2-HEBU] (quoting Dennis Shaul, Chief Executive Officer of CFSA who stated CFPB's proposed rule will "cut off access to credit").

[9] *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47,864, 48,129 (proposed July 22, 2016) (to be codified at 12 C.F.R. pt. 1041); Richard J. Thomas, *Rolling over Borrowers: Preventing Excessive Refinancing and Other Necessary Changes in the Payday Loan Industry*, 48 WM. & MARY L. REV. 2401, 2435 (2007).

[10] *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. at 47,866.

B. Payday Loans and the "Debt Trap"

A payday loan is an unsecured, short-term loan, often for $500 or less. [11] In order to obtain a payday loan, a borrower must have an active checking account, show proof of regular income, and write a personal check for the amount of the advance plus a fee.[12] According to research by the CFPB, the typical fee charged by payday lenders is $15 per $100 borrowed over a two-week period, which equates to an annual percentage rate (APR) of 391 percent.[13] The lender then advances the funds to the borrower and holds the personal check for the term of the loan, which is often two or four weeks.[14] When the loan comes due, the lender will deposit the check or, in the case of storefront lenders, unlike online lenders, the borrower may return to the storefront with cash to reclaim the check.[15] If a borrower is unable to repay the loan at maturity, a lender is permitted to "roll over" the loan subject to any state-imposed restrictions.[16] If the loan is "rolled over," the repayment of the principal is extended for another term (generally another two weeks) with the borrower agreeing to pay a new set of fees.[17]

In a study that tracked storefront payday borrowers, the CFPB found "that more than 80 percent of payday loans . . . were rolled over or reborrowed within 30 days, incurring additional fees with every renewal."[18] Borrowers who roll over their loans multiple times, often at the suggestion of the payday lender, accrue new fees with each roll over. This practice results in many borrowers ultimately paying more "in refinancing fees than the value of their initial loans."[19] When a

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[11] Silberman, *supra* note 3.
[12] *Id.*; *What is a payday advance?*, *supra* note 4.
[13] *See*, *e.g.*, Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. at 47,869 (discussing typical fee characteristics of payday loans as researched by CFPB).
[14] *What is a payday advance?*, *supra* note 4.
[15] *Id.*
[16] *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. at 47,869.
[17] *Id*. at 47,869–70.
[18] CONSUMER FIN. PROTECTION BUREAU, PAYDAY LOANS, AUTO TITLE LOANS, AND HIGH-COST INSTALLMENT LOANS: HIGHLIGHTS FROM CFPB RESEARCH 1 (June 2, 2016), http://files.consumerfinance.gov/f/documents/Payday_Loans_Highlights_From_CFPB_Research.pdf [https://perma.cc/X4K8-A44J].
[19] Thomas, *supra* note 9, at 2410.

borrower faces a continued inability to pay, the practice of rolling over loans or taking out additional loans to pay the first creates a cycle of debt, also known as a "debt trap."[20] A borrower may accumulate additional debt via bank overdraft fees due to a lender's repeated attempts to debit an account that has insufficient funds.[21] In this way, borrowers may "find themselves in a worse financial position than before entering the payday loan market."[22] As a result of borrowers' continued inability to repay, many loans are ultimately uncollectable.[23] The CFPB estimates that, from 2010 to 2011, "for every $1.00 loaned, only $.50 in principal was eventually repaid."[24] In light of the inability of lenders to collect on many of these loans, lenders "are dependent on repeated reborrowing" and high rollover fees to withstand the significant losses resulting from uncollectible payday loans.

C. State Regulation and Consumer Advocacy

Presently, payday loans are regulated by state-enacted legislation, the Truth in Lending Act,[25] and the Military Lending Act.[26] State regulation of payday loans includes interest rate caps through state usury laws, principle maximums, rollover maximums or

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[20] *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47,864, 47,932 (proposed July 22, 2016) (to be codified at 12 C.F.R. pt. 1041).

[21] *See* Press Release, Consumer Fin. Protection Bureau, Consumer Financial Protection Bureau Proposes Rule to End Payday Debt Traps (June 2, 2016), http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-rule-end-payday-debt-traps/ [https://perma.cc/N58Q-AU6K] [hereinafter CFPB Press Release].

[22] Shane M. Mendenhall, *Payday Loans: The Effects of Predatory Lending on Society and the Need for More State and Federal Regulation*, 32 OKLA. CITY U. L. REV. 299, 311 (2007).

[23] *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. at 47,874 (finding "the loss rates on storefront payday loans—the percentage or amounts of loans that are charged off by the lender as uncollectible—are relatively high.").

[24] *Id*.

[25] *Id.* at 47,875.

[26] *What are my rights under the Military Lending Act?*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/askcfpb/1783/what-are-my-rights-under-military-lending-act.html [https://perma.cc/4TUL-VHSX]; *see also* KAUFMAN, *supra* note 6, at 4.

restrictions, and outright bans.[27] In North Carolina and Arizona, the expiration of the authorizing statutes and small loan rate caps of approximately 36 percent has effectively banned payday lending.[28] Virginia's payday lending law sets "the minimum loan term to the length of two income periods" and requires "a 45-day cooling-off period" after a borrower's "fifth loan in a 180-day period" before a lender may make a new loan.[29] Colorado's payday lending regulation has received attention for its balanced approach.[30] Colorado allows a maximum loan amount of $500 and only one rollover permitted per loan.[31] Colorado imposes a graduated finance cap of 20 percent for the first $300 loaned, plus 7.5 percent "for any amount loaned in excess of [$300]."[32] In addition, Colorado caps interest rates for deferred payday loans at 45 percent APR. "Colorado's rule focuses on limiting the amount of each payment but doesn't require underwriting, or checking on the borrower's ability to repay the loan."[33] Despite state regulation of payday loans, some payday lenders have successfully avoided state usury laws through strategic use of the National Bank Act and "charter renting."[34] Online payday lenders, the growth of which has risen significantly, have also posed a challenge to state regulators due to online lenders' similar ability to evade state usury laws.[35]

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[27] Paige Marta Skiba, *Regulation of Payday Loans: Misguided?*, 69 WASH. & LEE L. REV. 1023, 1030 (2012).

[28] *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. at 47,875.

[29] *Id.* at 47,876.

[30] *See Payday Lending*, *supra* note 2.

[31] COLO. REV. STAT. §§ 5-3.1-106, 108 (2010).

[32] *See* § 5-3.1-105.

[33] *Payday Lending*, supra note 2.

[34] *See, e.g.*, Thomas, *supra* note 9, at 2418–19 (discussing the strategy whereby a national bank "rents its charter to the payday loan lender so that the lender can avoid the usury laws of the state where loans are made," thereby allowing lenders "to charge the maximum rate allowed by the law of the state where the [national] bank is located, rather than that of the state in which the lender is located") (citing Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation*, 88 MINN. L. REV. 518, 575 (2004)).

[35] *See A Short History of Payday Lending Law*, PEW CHARITABLE TRS. (July 18, 2012), http://www.pewtrusts.org/en/research-and-analysis/analysis/2012/07/a-short-history-of-payday-lending-law [https://perma.cc/5WT9-E88J] ("These [online] lenders pose challenges for state regulators, as national banks are typically exempt from state lending laws and online providers, who

Since the creation of the CFPB under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), many commentators of the payday loan market and consumer advocates have called for the CFPB to put forth regulations to directly address payday loans at the federal level.[36] However, some commentators have cautioned against regulation that eliminates or effectively eliminates payday lending.[37] Although payday loans' high costs and some lenders' predatory practices may to lead borrowers into a debt trap, payday loans have the potential to be helpful credit instruments when used "in the appropriate circumstances and in moderation, and when paid off promptly."[38] Since other forms of credit are "seldom available to the population that tends to use payday loans," perhaps the best "policy would permit payday lending at least to the extent it increased utility, and would constrain it only as necessary to prevent the truly negative net effects."[39] Preserving the availability of payday lending also protects a consumer's ability to choose whether a payday loan is a better choice than some other consequence from failure to pay another debt obligation.[40] "For instance, if unexpected medical expenses leave a family short on money to pay utilities, a payday loan may be preferable to an electricity shutoff and eventual reconnect fee."[41] In light of these benefits, commentators argue that the regulation should be aimed at "help[ing] all borrowers use payday loans responsibly."[42]

D. CFPB Proposed Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans

While the Truth in Lending Act and Military Lending Act provide some consumer protection through required disclosure of finance charges and interest rates, the CFPB's proposed rule is the first

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tend to incorporate offshore, on tribal land, or in states without usury caps, often evade state authority.")

[36] *See* Leah A. Plunkett & Ana Lucía Hurtado, *Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 SUFFOLK U. L. REV. 31, 54 (2011).

[37] *See, e.g.*, Skiba, *supra* note 27, at 1028–29.

[38] *Id.*

[39] *Id.*

[40] *See* KAUFMAN, *supra* note 6, at 2.

[41] *Id*.

[42] Skiba, *supra* note 27, at 1045; *see* Thomas, *supra* note 9, at 2425.

federal regulation to directly address payday loans.[43] The CFPB was created in 2010 under the Dodd-Frank Act to address and enforce against predatory financial practices in response to the 2008 financial crisis.[44] The CFPB asserts its authority to regulate payday loans under Section 1031 of the Dodd-Frank Act, which authorizes the CFPB to "identify and prevent unfair, deceptive, and abusive acts and practices," known as UDAAP.[45] While the CFPB has exercised its rule-making efforts in focused sectors in the past, the regulation of payday lending is the CFPB's first time exercising its authority specifically under UDAAP.[46] The CFPB's proposed rule would apply to all lenders, both online and storefront, making any loan covered by the proposal.[47] In a press release issued in June 2016, the CFPB stated the following:

> The Bureau has serious concerns that risky lender practices in the payday, auto title, and payday installment markets are pushing borrowers into debt traps. Chief among these concerns is that consumers are being set up to fail with loan payments that they are unable to repay. Faced with unaffordable payments, consumers must choose between defaulting, reborrowing, or skipping other financial obligations like rent or basic living expenses like food and medical care. The CFPB is concerned that these practices also lead to collateral damage in other aspects of consumers' lives such as steep penalty fees, bank account closures, and vehicle seizures.[48]

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[43] *See* Nick Bourke, *Proposed Payday Lending Rule Would Leave Borrowers Vulnerable*, PEW CHARITABLE TRS. (June 2, 2016), http://www.pewtrusts.org/en/research-and-analysis/analysis/2016/06/01/proposed-payday-lending-rule-would-leave-borrowers-vulnerable [https://perma.cc/3DQU-VWAL].

[44] *See Creating the Consumer Bureau*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/the-bureau/creatingthebureau/ [https://perma.cc/S9GC-YY7A].

[45] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47,864, 47,864 (proposed July 22, 2016) (to be codified at 12 C.F.R. pt. 1041) (relying on sections 1022, 1024, 1031, and 1032 of the Dodd-Frank Act); *see also* Dodd-Frank Act § 1031, 12 U.S.C. § 5531 (2010).

[46] *See U.S. to Curb Payday Lenders*, *supra* note 2.

[47] *See* CFPB Press Release, *supra* note 21.

[48] *Id*.

In an attempt to address the "debt trap" problem and predatory practices of payday lenders, the proposed rule sets forth several guidelines for payday lenders.[49] First, lenders would be required to perform a series of "full-payment tests" to verify that borrowers can "repay their loans without reborrowing."[50] Second, the proposal aims to end "debt traps" by imposing restrictions on a lender's ability to permit rollovers or to re-issue loans to borrowers within a certain period of time after paying off the previous loan.[51] Third, the proposed rule requires lenders to notify the borrower in writing at least three days before attempting to debit an account and would limit the number of attempts by a lender to make a withdrawal.[52]

1. Full-Payment Test

Under the proposed full-payment test, lenders would be required to determine borrower's ability to repay the loan.[53] As part of this test, a lender would be required to make a "reasonable determination" that the borrower has the ability to repay the loan as well as the ability to pay for other necessary expenses "without needing to reborrow over the ensuing thirty days."[54] Specifically, lenders would be required to make certain verifications regarding a borrower's income and other financial history.[55] By requiring lenders to make certain determinations as to a borrower's ability to repay the loan, the CFPB argues that the full-payment test would protect "distressed borrowers" from being pressured "into reborrowing or refinancing the same debt."[56] In an effort to preserve credit options for financially sound borrowers, the proposed rule carves out an exception to the full-payment test for short-term loans less than $500, provided that the borrowers do not "have outstanding short-term or balloon-

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[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47,864, 47,865 (proposed July 22, 2016) (to be codified at 12 C.F.R. pt. 1041).
[55] *See id.* (explaining that ability to re-pay requirements include verification of consumer's net income, debt, housing costs, basic living expenses, etc.).
[56] CFPB Press Release, *supra* note 21.

payment loans or have [not] been in debt on short-term loans more than 90 days in a rolling 12-month period."[57]

2. Rollover Restrictions

With many borrowers falling into a cycle of debt caused by rolling over loans, the CFPB's proposed rule seeks to protect consumers by restricting lenders' ability to permit reborrowing or refinancing of the same debt.[58] Under the rollover restrictions, lenders would be restricted from offering a new loan unless a borrower was able to demonstrate that his or her financial situation has improved.[59] However, in no event would a lender be permitted to rollover a loan more than three times.[60] A mandatory thirty-day "cooling period" following a borrower's third-straight loan would also restrict a borrower's ability to obtain a new loan immediately after paying off the previous loan.[61]

3. Withdrawal Restrictions

As aforementioned, a payday lender may collect on a loan by depositing the borrower's check for the amount of the loan at the maturity of the loan. However, repeated, unsuccessful attempts by lenders to debit a borrower's account can result in overdraft fees and account closures.[62] In order to protect consumers from the additional accumulation of debt through bank fees, the CFPB's proposed rule would require lenders to provide borrowers with "written notice at least three business days before each attempt to withdraw payment for a covered loan from a consumer's checking, savings, or prepaid account."[63] Upon giving notice, after two unsuccessful attempts to debit payment from a borrower's account, "the lender would be

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[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* (referring to a CFPB study, "which found over a period of 18 months, half of online borrowers had at least one debit attempt that overdrafted or failed, and more than one-third of borrowers with a failed payment lost their account").
[63] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47,864, 47,866 (proposed July 22, 2016) (to be codified at 12 C.F.R. pt. 1041).

prohibited from debiting the account again unless the lender gets a new and specific authorization from the borrower."[64]

4. Comments

Under the comment period ending on October 7, 2015, consumer comments were solicited and submitted on consumers' behalves by consumer protection advocacy groups and payday lenders alike.[65] Commenters against the proposed rule and in favor of payday loans emphasize the convenience of such loans as well as the importance of a consumer's right to choose how to spend his or her money.[66] Commenters in favor of the proposed rule highlight the predatory practices of payday lenders and the tendency of borrowers to fall into a cycle of repeated borrowing, leaving borrowers unable to pay for other necessary expenses, including housing.[67] However, some in favor of the proposed rule have urged for stricter regulation in light of potential loopholes, such as certain exceptions to the ability-to-

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[64] CFPB Press Release, *supra* note 21.
[65] *See* Coalition on Homelessness and Housing, Comment Letter on Payday Loan, Vehicle Title Loans, and Consumer Loan Regulations Proposed Rule (July 26, 2016), https://www.regulations.gov/document?D=CFPB-2016-0025-39930 [https://perma.cc/JS9W-SB5P] [hereinafter COHHIO Comment Letter] (arguing in favor of proposed rule and providing consumer comments against payday loans); Dawn Scott, Comment Letter on Payday Loan, Vehicle Title Loans, and Consumer Loan Regulations Proposed Rule (July 25, 2016), https://www.regulations.gov/document?D=CFPB-2016-0025-144144 [https://perma.cc/Q4GK-63RB] (writing in support of payday loans).
[66] *See, e.g.*, Melanie Dunton, Comment Letter on Payday Loan, Vehicle Title Loans, and Consumer Loan Regulations Proposed Rule (July 29, 2016), https://www.regulations.gov/document?D=CFPB-2016-0025-144144 [https://perma.cc/Q4GK-63RB] (writing in favor of payday loans and her "right to choose when and how often I get my advances").
[67] *See, e.g.*, COHHIO Comment Letter, *supra* note 65.

repay determination,[68] and the ability of lenders to continue to make high-cost loans.[69]

E. Criticism

While the CFPB's proposed regulation does not outright prohibit payday lending, payday lenders argue that the regulation will nonetheless force payday lenders out of the market and "leave low-income borrowers without much-needed credit."[70] In addition, because the CFPB's UDAAP authority under Section 1031 is quite broad, critics of the regulation caution about the sweeping effects the regulation may have on financial institutions besides payday lenders.[71] Advocates for payday lending argue that the CFPB's proposed rule would restrict lending, reduce consumer choice, and result in potential borrowers seeking short-term loans through other, possibly illegal channels.[72] Dennis Shaul, the Chief Executive Officer of the Community Financial Services Association of America,[73] stated that the CFPB's regulation "does nothing to address the ongoing problem of illegal lenders in this market."[74] Even those in support of federal

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68 *See, e.g.*, COHHIO Comment Letter, *supra* note 65 (urging CFPB to "eliminate weaknesses in the final regulations" that would allow lenders to "exploit unintentional loopholes"); Opportunity Finance Network, Comment Letter on Payday Loan, Vehicle Title Loans, and Consumer Loan Regulations Proposed Rule (Oct. 7, 2016), https://www.regulations.gov/document?D=CFPB-2016-0025-142123 [https://perma.cc/45QP-ASPG].

69 *See* Bourke, *supra* note 43 ("As drafted, the CFPB rule would allow lenders to continue to make high-cost loans, such as a line of credit with a 15 percent transaction fee and a 299 percent interest rate . . . .").

70 *See U.S. to Curb Payday Lenders*, *supra* note 2.

71 *See id*.; Thomas P. Brown et al., *CFPB Proposes New Rule Targeting Small Dollar Loans, Relies on UDAAP Rulemaking Authority for First Time*, PAUL HASTINGS: STAY CURRENT, June 2016, at 1, http://www.paulhastings.com/docs/default-source/PDFs/client-alert---cfpb-proposed-payday-lending-rule-june2016.pdf [https://perma.cc/Z3NC-9VNB].

72 *See* Andrew Taylor, *House panel moves to block Obama regulations on payday loans*, PBS (June 9, 2016), http://www.pbs.org/newshour/rundown/house-panel-moves-to-block-obama-regulations-on-payday-loans/ [https://perma.cc/P3UK-6J6U] (quoting Mississippi Representative Steve Palazzo, stating "Drying up all of the access to credit will cause small businesses to close, people to lose their jobs, and many to turn to less-regulated, often illegal means of securing credit").

73 *See* Shaul, *supra* note 8.

74 *Id.*

regulation have criticized the CFPB's proposed regulation as failing to adequately protect payday loan consumers.[75] The Pew Charitable Trusts[76] released an article urging even stronger regulatory measures, stating that the proposed rule would "[lock] out lower-cost loans from banks" while still permitting lenders to charge fees at any rate "as long as they make a 'reasonable determination' that the borrower can repay the loan."[77] With discretion left to payday lenders to evaluate a borrower's ability to pay,[78] the effectiveness of such regulation is uncertain. In addition, following the 2016 presidential election, some commentators have hypothesized that the incoming Trump administration could "upend" new CFPB regulation, including that related to payday loans.[79] Although President-Elect Trump has vowed to "dismantle" significant portions of the Dodd-Frank Act, how the CFPB's regulations will ultimately be affected is still unclear.[80]

F. Conclusion

As the negative effects of predatory payday lending practices have been revealed over the past decade, the need for federal regulation of these loans has become a major focus for consumer advocacy groups.[81] The first federal regulation to directly address payday loans, the CFPB's proposed rule seeks to prevent the predatory

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75 Bourke, *supra* note 43 (finding that the new rule will remove protections such as a five percent payment option).

76 The Pew Charitable Trusts is a consumer advocacy organization in support of payday regulation aimed at protecting consumers. *Id.*

77 *Id*.

78 *See id*. (suggesting that the "reasonable determination" requirement fails to actually curb lenders' behavior).

79 *See, e.g.*, James Rufus Koren, *Trump administration could upend post-crisis financial reforms, weaken CFPB*, L.A. TIMES (Nov. 9, 2016), http://www.latimes.com/business/la-fi-trump-dodd-frank-20161109-story.html [https://perma.cc/J8LE-HQHW]; Annamaria Andriotis, *From Mortgages to Payday Loans, How Trump Will Impact Consumer Lending*, WALL ST. J.: MONEYBEAT (Nov. 10, 2016, 10:58 AM), http://blogs.wsj.com/moneybeat/2016/11/10/from-mortgages-to-payday-loans-how-trump-will-impact-consumer-lending/ [https://perma.cc/X9CV-VS7A].

80 Koren, *supra* note 79.

81 *See, e.g.*, *Policy Solutions*, PAYDAY LENDING IN AMERICA (Pew Charitable Trs., Phila., Pa.), Oct. 2013, at 3, http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2013/pewpaydaypolicysolutionsoct2013pdf.pdf [https://perma.cc/H2CK-ZW5W].

lending practices that have proven detrimental to borrowers, particularly the failure to verify a borrower's ability to repay, rollover lending, immediate re-issuance of loans, and multiple withdrawal attempts.[82] Although it is not entirely clear how the CFPB's regulation will affect the payday loan market or other small-dollar bank loans,[83] this regulation appears to strike the balance between protecting consumers against the harmful practices of payday lenders while still preserving the option for credit-impaired consumers to access credit and other financial products.

Julia Merton[84]

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[82] *See, e.g.*, CFPB Press Release, *supra* note 21.
[83] *See, e.g.*, Taylor, *supra* note 72.
[84] Student, Boston University School of Law (J.D. 2018).