CFPB's Proposed Rule Regarding Payday, Title, and Certain Other Installment Loans

On June 2, 2016, the CFPB published its proposed rule (the "Proposed Rule") addressing payday loans, vehicle title loans, and certain other installment loans (collectively "covered loans"). This alert summarizes the Proposed Rule and compares the Proposed Rule to the CFPB's March 26, 2015 outline released pursuant to the Small Business Regulatory Enforcement Fairness Act (SBREFA). Those wishing to comment on the Proposed Rule must do so by September 14, 2016.

Summary of the Proposed Rule

The Proposed Rule is issued pursuant to the CFPB's authority under section 1031 of the Dodd-Frank Act to identify and prevent unfair, deceptive, and abusive acts and practices. It defines two types of covered loans: (1) "short-term" loans that have terms of 45 days or less; and (2) "longer-term" loans with terms of more than 45 days that have a "total cost of credit" exceeding 36% and either a "leveraged payment mechanism" or a security interest in the consumer's vehicle. A "leveraged payment mechanism" includes a right for the lender to initiate transfers from the consumer's account and certain other payment mechanisms. The Proposed Rule would exclude (i) credit extended for the sole and express purpose of financing a consumer's initial purchase of a good when the credit is secured by the property being purchased; (ii) credit secured by any real property or by personal property used or expected to be used as a dwelling; (iii) credit cards; (iv) student loans; (v) non-recourse pawn loans; and (vi) overdraft services and lines of credit.

The Proposed Rule would make it an abusive and unfair practice for a lender to make a covered short-term or longer-term loan without determining upfront that the consumer will have the ability to repay the loan (the "full-payment test"). For both types of covered loans, the Proposed Rule would require a lender to determine whether the consumer can afford the full amount of each payment of a covered loan when due and still meet basic living expenses and major financial obligations. As a practical matter, the full-payment test imposes restrictions on rollovers, loan sequences, and refinancing by preventing the offering of short-term loans fewer than 30 days after payoff without a showing that the borrower's financial situation is materially improved (and capping successive short-term loans at 3 before requiring a 30-day cooling off period), and preventing the refinancing of longer-term loans without a showing that payments would be smaller or would lower the total cost of credit. The Proposed Rule also would provide conditional exemptions for certain covered loans meeting specified criteria, as discussed further below. These conditional exemptions essentially provide alternative compliance options to the Proposed Rule's full-payment test. Additionally, the Proposed Rule would require lenders to use and furnish information to registered information systems established to track covered loans.

Further, the Proposed Rule would address payment transfers in connection with covered loans. Specifically, the Proposed Rule would make it an unfair and abusive act or practice for a lender to attempt to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive attempt to withdraw payment from the account has failed due to a lack of sufficient funds, unless the lender obtains the consumer's new and specific authorization to make further withdrawals from the account. The Proposed Rule also would require lenders to provide consumers with certain disclosures regarding (i) upcoming withdrawals and (ii) withdrawals with a varying payment amount, a date other than the regularly scheduled date, or differing payment channel. Disclosures also would be required after a lender initiates two consecutive failed payment transfers from a consumer's account.

In addition to the Proposed Rule, the CFPB issued a Request for Information seeking information regarding loan products and practices not covered by the Proposed Rule. The Request for Information includes topics such as "enhanced" collections practices (e.g., garnishment orders); prepayment penalties; practices that may encourage borrowers to refinance; default interest rates, late fees, and other "back-end" pricing; and ancillary products.

Comparison of the Proposed Rule to the CFPB's SBREFA Outline

Limitations on Covered Short-Term Loans

Issue	SBREFA Outline	Proposed Rule
Coverage Trigger	Contractual duration of 45 days or less	Contractual duration of 45 days or less
Ability to Repay Requirement		
Assessment of Ability to Repay	• Lender must assess the consumer's income and major financial obligations during the contractual duration of the loan and an additional 60 days beyond the contractual duration and determine whether, given the amount and timing of the consumer's income and major financial obligations, the consumer will have enough remaining income to be able to repay the loan after paying these major financial obligations and necessary living expenses • Lender must consider all expenses to be paid by the consumer in connection with the loan; including the loan principal, all fees and finance charges, and the cost of any ancillary products such as credit insurance, memberships, and other products sold along with the credit • Lenders also required to consider and provide for the fact that consumers typically have living expenses that are necessary, such as food and transportation costs, that are not itemized and verified • Extensive defaults or reborrowing may be an indication that the lender's methodology for determining ability to repay is not reasonable	• Lender must reasonably conclude based on projections of the consumer's income and major financial obligations that: o The consumer's residual income will be sufficient to make all loan payments and to meet basic living expenses during the shorter of the loan's term or the period ending 45 days after loan consummation; and o The consumer will be able to make payments required for major financial obligations as they fall due, to make any remaining payments under the loan, and to meet basic living expenses for 30 days after having made the highest payment under the loan on its due date • Basic living expenses defined as expenses, for goods and services necessary to maintain the consumer's health, welfare, and ability to produce income, and the health and welfare of members of the consumer's household who are financially dependent on the consumer; lender may use a reasonable method of estimating such expenses • Official Interpretations to the Proposed Rule note that whether a lender's ability to repay calculations are reasonable may depend on rates of delinquency, default, and reborrowing, including in comparison to other lenders
Income verification	Lender must verify the amount and timing of a consumer's income either through bank statements, benefit statements, or paystubs	Generally similar to the SBREFA outline. A lender must obtain (i) a consumer's written statement of the amount and timing of the consumer's net income receipts and (ii) "verification evidence" for the amounts and timing of the same. • Verification must be based on "reliable" records of income payments "covering sufficient history" to support the lender's projection of the consumer's ability to repay • A "reliable record" includes a facially genuine original, photocopy, or image of (i) a document stating the amount

Issue	SBREFA Outline	Proposed Rule
		and date of the income paid to the consumer or (ii) a record of depository account transactions, prepaid account transactions or money services business check-cashing transactions showing the amount and date of a consumer's receipt of income
Verification of major financial obligations	Lenders must obtain and verify information about the amount and timing of the consumer's major financial obligations • Major financial obligations are those expenses that are significant in their amount and that cannot be readily eliminated or reduced in the short term, such as housing payments (including mortgage or rent payments), required payments on debt obligations, child support, and other legally required payments • Must verify major financial obligations using third-party records or other appropriate methods of verification (e.g., a credit report to verify debt obligations and to obtain receipts, cancelled checks, copies of the lease, or bank account records to verify housing payments) • CFPB evaluating whether monthly bank account records could be used to verify major financial obligations more generally	Generally similar. A lender must obtain (i) a consumer's written statement of the amount and timing of payments for categories of the consumer's major financial obligations; and (ii) verification evidence of the same. • 'Major financial obligations" means a consumer's housing expense, minimum payments and any delinquent amounts due under debt obligations (including outstanding covered loans) and child support. • Acceptable verification evidence includes: o For debt obligations, a national consumer report, the records of the lender and its affiliates, and a consumer report obtained from a registered information system for tracking covered loans pursuant to the Proposed Rule o For child support obligations, a national consumer report o For a consumer's housing expense other than a payment for a debt obligation appearing on a national consumer report, either (i) a reliable transaction record of recent housing expense payments or a lease or (ii) an amount determined under a reliable method of the housing expenses of consumers in the consumer's locality
Borrowing history	• Must determine whether the consumer had taken out any covered short-term loans with that lender or its affiliates at any time within the previous 18 months • CFPB evaluating whether lenders should be required to consider a consumer's borrowing history with non-affiliated lenders at any time within the past 18 months based on a commercially available reporting system • CFPB evaluating whether lenders should be required to consider, as part of the ability-to-repay determination, whether a	• As noted above, a lender is required to consider its records, its affiliates' records, and a consumer report obtained from a registered information system for tracking covered loans pursuant to the Proposed Rule • See "Rebuttable Presumptions Regarding Ability to Repay" below for additional information regarding the effect of covered loan borrowing history

Issue	SBREFA Outline	Proposed Rule
	consumer has recently defaulted or is currently delinquent on any covered loans with that lender or its affiliates	
Rebuttable Presumptions Regarding Ability to Repay	CFPB considering imposing a presumption that consumers who attempt to reborrow within a certain period of time after a prior covered short-term loan lack the ability to repay the new covered loan if the new loan has a similar payment structure	Scenarios creating a rebuttable presumption of unaffordability include (subject to exceptions omitted for brevity): • The consumer has a covered short-term loan outstanding and for 30 days thereafter • The consumer has a covered longer-term balloon-payment loan outstanding and for 30 days thereafter • Any of the following if the consumer has a covered or non-covered loan outstanding that was made or is being serviced by the lender or its affiliate: o The consumer is or has been delinquent by more than 7 days within the past 30 days o The consumer expresses within past 30 days an inability to make one or more payments o The period between consummation of the new loan and its first scheduled payment would be longer than the time period of between consummation of the new loan and the outstanding loan's next regularly scheduled payment o The new loan would result in the consumer receiving no disbursement of loan proceeds or an amount of funds as disbursement of the loan proceeds that would not substantially exceed the amount of payment or payments that would be due on the outstanding loan within 30 days of consummation of the new covered longer-term loan The presumptions of unaffordability can be rebutted if the lender reasonably determines based on reliable evidence that the consumer will have sufficient improvement in financial capacity such that the consumer will have the ability to repay the new loan according to its terms.
Assumptions applicable to open-end lines of credit	CFPB considering (i) requiring the lender to make certain assumptions about credit utilization and repayment in order to determine the consumer's ability to repay; (ii) a specific proposal to require the lender to assume that a	The Proposed Rule requires applicable lines of credit to be evaluated assuming: (i) the consumer will use the full amount of credit as soon as the credit is available; (ii) that the consumer will make only minimum required payments.

Issue	SBREFA Outline	Proposed Rule
	consumer fully utilizes the line credit upon origination and makes only the minimum required payments until the end of the contract period, at which point the consumer is assumed to make a single payment in the amount of the remaining balance and any remaining finance charges, and (iii) a proposal to require the lender to assume full repayment on the loan by the payment date specified in the contract	
Conclusive presumption of unaffordability	After the third loan in a sequence, conclusive presumption that the consumer lacks the ability to repay a loan with a similar repayment structure without reborrowing or defaulting. The period would continue for 60 days.	Conclusive presumption of unaffordability applies while the third loan in a sequence is outstanding and 30 days thereafter
Conditional Exemption to the Ability-to-Repay Determination		
Income verification	Must verify the consumer's income	Income verification not required
Existing and Prior Loans	• Must use a commercially available reporting system to verify covered loan borrowing history • Confirmation that the consumer does not have an outstanding covered loan is required • Must confirm that the consumer has taken out no more than three such alternative loans in a sequence (with a sequence including any loan taken out within 60 days of having a prior loan outstanding) and has not completed a three-loan sequence of alternative loans from any lender within the past 60 days • Confirmation that the loan would not result in the consumer receiving more than six covered short-term loans from any lender in a rolling 12-month period is required • Must confirm that, following completion of the contractual loan term, the consumer will not have been in debt on covered short-term loans for more than 90 days in the aggregate during a rolling 12-month period	• Lender must review the consumer's borrowing history in its records, affiliate records, and a consumer report from a register information system for tracking covered loans pursuant to the Proposed Rule • Lender must verify that consumer does not have a covered loan outstanding (excluding a loan made by the lender or an affiliate that is being rolled over and a longer-term loan pursuant to a conditional exception) • Lender must verify that consumer does not have had in the past 30 days an outstanding covered short-term loan or longer-term balloon payment loan (excluding loans made pursuant to a conditional exception) • The loan cannot result in consumer having a loan sequence of more than three covered short-term loans made by any lender under the conditional exception • In any 12-month period, (i) the loan cannot result in more than 6 covered loans in the period; and (ii) consumer cannot have short term loans outstanding for an aggregate period of more than 90 days
Limit on amount financed	$500	Same (subject to the "taper off" requirement below)
Loan Structure	No more than one finance charge for the term of 45 days or less	• Must amortize completely during the term of the loan and the payment schedule must provide allocating a consumer's payments to the

Issue	SBREFA Outline	Proposed Rule
		outstanding principal and interest and fees as they accrue only by applying a fixed periodic rate of interest to the outstanding balance • May not be structured as open-end credit
Security interest	The consumer must not provide a security interest in a vehicle as collateral for the loan	Same
"Taper off" requirement	Two alternatives under consideration: • Tapering such that the principal must be repaid in a three loan sequence • No "cost extension" requiring the lender to permit repayment of a third loan in a sequence to at no additional cost over four additional installments	Proposed Rule chooses the first option and would create an amortizing sequence where the first loan in a sequence cannot exceed $500; the amount of a second loan cannot exceed two-thirds the amount of the first loan; and the amount of a third loan cannot exceed one-third of the first loan

Longer-Term Loans

Issue	SBREFA Outline	Proposed Rule
Coverage Trigger	An "all-in" APR of more than 36% *and* either: • A preferred repayment position" through "access" to the consumer's account (*e.g.*, by means of a post-dated check, ACH debit authorization, or similar methods); or • A non-purchase money security interest in the consumer's vehicle	Retains the "all-in" APR of more than 36% trigger, in combination with: • A "leveraged payment mechanism" (*i.e.*, the ability to initiate a transfer of money from the consumer's account, obtain payment directly from the consumer's employer or source of income, or the requirement that the consumer repay through a payroll deduction or deduction from another source of income); or • A security interest in the consumer's vehicle, with an exception for credit extended for the sole and express purpose of financing the initial purchase of a good when the credit is secured by the property purchased
Definition of "all-in" APR	"One possible measure is the military annual percentage rate defined in 32 CFR 232, which generally includes all interest and fees for the extension of credit as well as fees for credit-related ancillary products and insurance or debt cancellation agreements"	The total amount of charges imposed in connection with the loan, including charges for credit insurance, ancillary products, finance charges as set forth in Regulation Z (and potentially expanded in some circumstances), application fees, and fees for "participation in any plan or arrangement for a covered loan"
Ability to Repay Determination		
Assessment of Ability to Repay	• Remaining income after accounting for obligations verified above shows that a consumer has the ability to make payments under the loan as they fall due • Analysis applies to each scheduled payment of the covered longer-term loan—a lender would be prohibited	• Lender must reasonably conclude based on projections of the consumer's income and major financial obligations that the consumer's residual income will be sufficient for the consumer to make all payments under the loan and to meet basic living expenses during the term

Issue	SBREFA Outline	Proposed Rule
	from making the loan if any of the payments did not satisfy the ability-to-repay determination • Lender is *not* be required to presume that the consumer lacks the ability to repay the new loan for a consumer who takes out a new covered longer-term loan shortly after repaying such a loan, subject to the presumptions below	of the loan for non-balloon loans • For a covered balloon-payment loans, the consumer must be able to make payments required for major financial obligations as they fall due, to make any remaining payments under the loan, and to meet basic living expenses for 30 days after having made the highest payment under the loan on its due date • Lack of presumption of unaffordability remains for non-balloon loans
Income verification	Similar to covered shorter-term loans	Similar to covered shorter-term loans
Verification of major financial obligations	Similar to covered shorter-term loans	Similar to covered shorter-term loans
Rebuttable Presumptions Regarding Ability to Repay	• The consumer applies for a loan within 60 days of after being in debt on a covered longer-term loan with a balloon payment, a covered short-term loan, or a mix of the two • The consumer was, at the time of the refinancing, delinquent or had recently been delinquent on a payment under the loan being refinanced • The consumer stated or otherwise indicated that he or she was unable to make a scheduled payment under the loan being refinanced or that the loan being refinanced was causing financial distress • The refinancing provides for the consumer to skip (or pay a lesser amount than) a payment that otherwise would have been due under the loan being refinanced, unless the refinancing provides for a substantial amount of cash out to the consumer • The loan being refinanced is in default	Generally similar to the SBREFA outline, but with a 30-day cooling off period for balloon and short-term loans. Scenarios creating a rebuttable presumption of unaffordability include: • The consumer has a covered short-term or longer-term balloon loan subject to the Proposed Rule's ability-to-repay requirement and for 30 days thereafter. However, this presumption would not apply if every payment on the new covered longer-term loan would be substantially smaller than the largest required payment on the prior covered short-term loan or covered longer-term balloon-payment loan. • Any of the following if the consumer currently has a loan outstanding that was made or is being serviced by the lender or its affiliate: o The consumer is or has been delinquent by more than seven days within the past 30 days o The consumer has expressed an inability to make one or more payments within the past 30 days o The period between consummation of the new loan and its first scheduled payment would be longer than the time period of between consummation of the new loan and the outstanding loan's next regularly scheduled payment o The new loan would result in the consumer receiving no disbursement of loan proceeds or an amount of funds as disbursement of the loan proceeds that would not substantially exceed the amount

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		of payment or payments that would be due on the outstanding loan within 30 days of consummation of the new covered longer-term loan The presumptions of unaffordability can be rebutted if the lender reasonably determines based on reliable evidence that the consumer will have sufficient improvement in financial capacity such that the consumer will have the ability to repay the new loan according to its terms
Assumptions applicable to open-end lines of credit	• Lender must assume that a consumer fully utilizes the credit upon origination and makes only minimum payments until the end of the contract period, at which point the consumer must make a single payment in the amount of the remaining balance • Lender must assume full repayment on the credit by the end of the contract period or, if no termination date is specified, six months from the date of origination	• Substantially similar to the outline. Lender must assume that the consumer will utilize the full amount of credit as soon as it is available, as opposed to at origination. • Lender must assume that the consumer must repay any remaining balance in one payment on the date that is 180 days following the consummation date if the terms would not provide for termination of access to the line of credit by a date certain and for full repayment of all amounts due by a subsequent date certain
Special rule regarding ability to repay for open-end lines of credit	No comparable provision	Lender must not permit a consumer to obtain an advance under the line of credit more than 180 days after the initial ability-to-repay determination unless the lender first makes a new ability-to-repay determination
Prohibition on making a covered longer-term after a covered short-term loan	No comparable provision	May not make a covered loan term loan subject to the ability-to-repay determination if the consumer has a covered short-term loan made under the conditional exemption above outstanding and for 30 days thereafter
Conditional Exemptions to the Ability-to-Repay Determination		
Loans Similar to the NCUA Payday Alternative Loan Program (Up to 6 Months)		
Underwriting	Must apply "minimum underwriting standards" and verify the consumer's income	The lender must maintain and comply with policies and procedures for documenting proof of recurring income
Required terms	Highlighted NCUA requirements for a Payday Alternative Loan include: • Loan must have a principal of not less than $200 and not more than $1,000 • Maximum term of 6 months • Lender must charge no more than a 28% annualized interest rate and an application fee, reflecting the actual costs of processing the application, of no more than $20 • Loan must fully amortize over no	Includes the following additional requirements: • Cannot be structured as open-end credit • Amortizes completely during the term and the payment schedule provides for allocating a consumer's payments to the outstanding principal and interest and fees as they accrue only by applying a fixed periodic rate of interest to the outstanding balance • May not impose a prepayment penalty

Issue	SBREFA Outline	Proposed Rule
	fewer than two payments	The Proposed Rule also defines the 28% rate limit as the "total cost of credit" not to exceed "the cost permissible for Federal credit unions to charge under regulations issued by the National Credit Union Administration at 12 CFR 701.21(c)(7)(iii)"
Existing loans	• Lender must verify the consumer's borrowing history and reports use of the covered loan to all applicable commercially available reporting systems • The consumer must have no other covered loan outstanding • No more than two loans during a rolling six- month period	• Lender must determine from its records and the records of its affiliates that the loan would not result in the consumer being indebted on *more than three* outstanding loans made under this exception from the lender or its affiliates within 180 days • Lender must furnish information concerning the loan either to the information systems for tracking covered loans registered pursuant to the Proposed Rule or to a nationwide consumer reporting agency
Additional protections if the lender holds a consumer's deposit account	May not: • Fully sweep the deposit account to a negative balance • Set off from the deposit consumer's account • Close the deposit account in the event of delinquency or default	Same
Conditional Exemption for Loans Not Similar to the NCUA Program (Up to 24 Months)		
Underwriting requirements	• Lender must verify the consumer's income • The periodic payment due on the loan is no more than 5 percent of the consumer's expected gross income during a rolling 12-month period	Substantially changed. Lender must maintain and comply with policies and procedures for effectuating an underwriting method designed to result in a portfolio default rate that will be less than or equal to 5% per year
Screening requirements regarding existing loans	• Lender must verify the consumer's borrowing history and reports use of the covered loan to all applicable commercially available reporting systems • No other covered loan outstanding and the consumer has not defaulted on a covered loan within the past 12 months • Loan would result in the consumer being in debt on no more than two such loans within a rolling 12-month period	• Lender must determine from its records and the records of its affiliates that the loan would not result in the consumer being indebted on more than two outstanding loans made under this exception from the lender or its affiliates within 180 days • Lender must furnish information concerning the loan either to the information systems for tracking covered loans registered pursuant to the Proposed Rule or to a nationwide consumer reporting agency
Required terms	• Loan is a closed-end loan repayable in at least two substantially equal payments over no fewer than 45 days • Loan has a maximum duration of no more than six months • No fees for prepayment of the loan	• Loan may not be structured as open-end credit • Term of no more than 24 months • Loan repayable in two or more payments due no less frequently than monthly, all of which payments are substantially equal in amount and fall due in substantially equal intervals • Loan amortizes completely during the term and the payment schedule

Issue	SBREFA Outline	Proposed Rule
		provides for allocating a consumer's payments to the outstanding principal and interest and fees as they accrue only by applying a fixed periodic rate of interest to the outstanding balance • May not impose a prepayment penalty
Total cost of credit limit	No comparable provision	• The "modified" total cost of credit must be less than or equal to an annual rate of 36%, exclusive of the origination fee below • Lender may impose a single origination fee that (i) represents a reasonable proportion of the lender's cost of underwriting loans made pursuant to this section or (ii) does not exceed $50
Portfolio default rate limit	No comparable provision	• At least once every 12 months, the lender must calculate the portfolio default rate for covered longer-term loans made under this exclusion • If portfolio default rate exceeds 5%, within 30 calendar days the lender must refund to each consumer any origination fee imposed in connection with the covered longer-term loan and excluded from the modified total cost of credit • Default rate measured based on the (i) the sum of dollars of loans either 120-days delinquent or charged off during a 12-month period (ii) divided by the average of month-end outstanding balances owed on all covered longer-term loans made under the conditional exemption for each month of the 12-month period

Covered Loan Payment Transfers

Issue	SBREFA Outline	Proposed Rule
Limitation on attempts to collect payment from a consumer's account	• After two consecutive failed attempts to collect payment, a lender would be prohibited from using any authorization it has at the time to make additional payment attempts on the loan • Lender may obtain a new authorization from the consumer after reaching the limit above and use the subsequently-granted authorization to collect future payments	The Proposed Rule incorporated the "two consecutive failed attempts" standard of the SBREFA outline, but provides significantly more detail regarding implementation. For example, the prohibition: • Includes any future payments due, pre-authorized electronic funds transfers, or post-dated checks, as well as any fees or charges otherwise permitted under the contract • Does not include payments in connection with a bona fide subsequent loan, provided the lender has not attempted to initiate two consecutive failed payments transfers

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<tr><th>Issue</th><th>SBREFA Outline</th><th>Proposed Rule</th></tr>
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<tr><td>Notice prior to attempting to collect payment from an account</td><td>Lender must provide written notice before each attempt to collect payment from a consumer’s checking, savings, or prepaid account. This notice must contain the following information and must be provided at least 3 business days in advance of each payment collection attempt and no more than 7 business days before payment is due:
• The “exact” amount and date of the upcoming payment collection attempt
• The payment channel through which the attempt will be made
• A break-down of the application of payment amount to principal, interest, and fees (if applicable)
• The loan balance remaining if the payment collection attempt succeeds
• The name, address, and a toll-free phone number that the consumer can use to reach the lender
• For payment collection attempts made by check, such as a post-dated signature check or remotely created check, the check number associated with the payment attempt</td><td>Framework of the required notice is similar, but the Proposed Rule revised the timing requirements and prescribed additional detail. Rather than applying a timeframe of 3-7 business days for all withdrawal notices, the Proposed Rule would provide different timing requirements based on the manner in which the lender sends the notice.
• If the lender mails the notice, the lender must do so no earlier than 10 business days and no later than 6 business days prior to initiating the transfer
• If the lender provides the payment notice through electronic delivery, the lender must send the notice no earlier than 7 business days and no later than 3 business days prior to initiating the transfer

The Proposed Rule also provides model forms and requires language substantially similar to those forms. In addition to the information enumerated in the SBREFA outline, the notice must also include:
• An identifying statement of withdrawal
• An identification of the consumer’s account
• A loan identification number
• The annual percentage rate;
• Any explanation of interest-only or negatively amortizing payments

Additional content requirements for unusual withdrawal such as varying amounts, payment dates, or payment channel, or to reinitiate a return transfer.

The notice requirements do not apply to:
• Certain covered longer-term loans of up to six months duration;
• Certain covered longer-term loans of up to 24 months;
• The first payment transfer from a consumer’s account after obtaining consent; or
• A single immediate payment transfer initiated at the customer’s request.</td></tr>
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Issue	SBREFA Outline	Proposed Rule
Notice regarding two consecutive failed payment transfers	No comparable provision	Further, after a lender initiates two consecutive failed payment transfers, the Proposed Rule requires the lender to provide a notice to the consumer no later than 3 business days after receiving the second failed attempt. The notice must use substantially similar language to that provided in the Proposed Rule's Model Form A-5

The summary and comparison above provide an overview of the requirements that would be imposed by the Proposed Rule. As noted, the Proposed Rule diverges from the CFPB's SBREFA outline in several important respects. Stakeholders who began substantive assessments based on the earlier information may find the need for some reevaluation. The Proposed Rule's text and Official Interpretations also contain many additional details regarding the Proposed Rule's requirements. We recommend that special attention be paid where the CFPB has left requirements, particularly with new underwriting, subject to inexact "reasonable" standards. While flexibility may be preferred, it may come at the expense of safe harbors from liability. In many cases the Proposed Rule expressly solicits public comments on these standards.

Questions regarding the matters discussed may be directed to any of our lawyers listed in this alert, or to any other Orrick attorney with whom you have consulted in the past.