

CUNA FINAL RULE ANALYSIS

PAYDAY LENDING RULE

OVERVIEW

On October 4, 2017, the Consumer Financial Protection Bureau (“CFPB”) issued its long-awaited payday lending rule. The rule establishes new regulations at Part 1041 titled “Payday, Vehicle Title, and Certain High-Cost Installment Loans.”

Among other things, the rule:

- Makes it an unfair and abusive practice for a credit union to make certain covered loans without reasonably determining that the member has the ability to repay the loan according to its terms;
- Makes it an unfair and abusive practice for a credit union to make repeated attempts to withdraw payment from a member’s account after its second consecutive attempt to do so has failed due to lack of sufficient funds;
- Imposes new disclosure requirements in connection with covered loans and payment transfer attempts; and
- Establishes a new registered information system network and associated information furnishing requirements for credit unions.

Part 1041 is organized as follows:

Subpart A – General

§ 1041.1 Authority and purpose

§ 1041.2 Definitions

§ 1041.3 Scope of coverage; exclusions; exemptions

Subpart B – Underwriting

§ 1041.4 Identification of unfair and abusive practice

§ 1041.5 Ability-to-repay determination required

§ 1041.6 Conditional exemption for certain covered short-term loans

Subpart C – Payments

§ 1041.7 Identification of unfair and abusive practice

§ 1041.8 Prohibited payment transfer attempts

§ 1041.9 Disclosure of payment transfer attempts

Subpart D – Information Furnishing, Recordkeeping, Anti-Evasion, and Severability

§ 1041.10 Information furnishing requirements

§ 1041.11 Registered information systems

§ 1041.12 Compliance program and record retention

§ 1041.13 Prohibition against evasion

§ 1041.14 Severability

**Appendix A to Part 1041 – Model Forms
Supplement I to Part 1041 – Official Interpretations**

COVERAGE

Covered Loans (§1041.3)

The requirements of Part 1041 apply to certain short-term or longer-term balloon payment loans (“covered loans”) originated by the credit union. A covered loan is defined as:

- An extension of credit primarily for a personal, family or household purpose; and
- Meets one of the following:

Closed-end loan (no multiple advances)	<ul style="list-style-type: none"> • The member is required to repay the loan within 45 days of consummation; or • The member is required to repay the loan: <ul style="list-style-type: none"> ○ In a single payment more than 45 days after consummation; or ○ Through at least one payment that is more than twice the amount of any other payment.
Open-end plan (multiple advances)	<ul style="list-style-type: none"> • The member is required to repay the entire amount of any advance within 45 days of the advance; • The plan results in negative amortization and the required final payment is more than twice the amount of any other payment made under the plan; or • The member is required to: <ul style="list-style-type: none"> ○ Repay the entire amount of any advance in a single payment more than 45 days after the advance; or ○ Make a payment toward any advance that is more than twice the amount of any other payment.
High-cost loans	<ul style="list-style-type: none"> • The <u>APR</u> exceeds 36% (at the time of consummation for closed-end credit or during any billing cycle for open-end credit); and • The credit union obtains a <u>leveraged payment mechanism</u>

For purposes of Part 1041:

- APR is the same as defined in:
 - Regulation Z § 1026.22 for closed-end credit;
 - Regulation Z § 1026.14 for open-end credit.
- Leveraged payment mechanism is when the credit union has the right to initiate a transfer of money, through any means, from the member's account to satisfy the loan obligation.

Exemptions (§1041.3)

The following loans are expressly excluded from the requirements of Part 1041:

- Certain purchase money security interest loans;
- Real estate secured loans (including personal property used as a dwelling);
- Credit card accounts;
- Student loans;
- Non-recourse pawn loans;
- Overdraft services and overdraft lines of credit;
- Wage advance programs; and
- No-cost advances.

Accommodation Loans (§1041.3)

Loans that would otherwise be covered under Part 1041 are exempt from the rule's requirements if originated by a credit union that:

- Together, with any affiliates, collectively made 2,500 or fewer covered loans in both the preceding and current calendar year; and
- During the most recent completed tax year, together with any affiliates, derived no more than 10% of its receipts from originating covered loans.

Loans originated under this exception are defined by the rule as accommodation loans.

Payday Alternative Loans (§1041.3)

Payday alternative loans ("PAL" loans) originated by a Federal credit union ("FCU") are deemed to be in compliance with the requirements of Part 1041. By way of reminder, a PAL loan is a loan originated in accordance with the following requirements found in Part 701.21(c)(7)(iii) of the NCUA's rules and regulations:

- The loan is closed-end;
- The loan term is between one and six months;
- The loan amount is between \$200 and \$1,000;
- The loan has a maximum interest rate of 28%;

- The FCU does not charge an application fee that exceeds \$20;
- The FCU makes no more than one PAL loan to a member at a time;
- The FCU does not make more than three PAL loans to a member in any rolling 6-month period;
- The FCU does not rollover any PAL loan;
- The loan does not result in negative amortization; and
- The borrower has been a member of the FCU for at least one month prior to receiving the PAL loan.

Alternative Loans (§1041.3)

A credit union may also originate an alternative loan under Part 1041. An alternative loan is conditionally exempt from most of the rule's requirements except that:

- The credit union must determine that extension of the alternative loan would not result in the member being indebted on more than three outstanding alternative loans within a 180-day period;
- The credit union must make no more than one alternative loan to a member at a time; and
- The credit union must maintain and comply with policies and procedures for documenting proof of recurring income.

An alternative loan must satisfy the following conditions and requirements:

- The loan must be closed-end;
- The loan must have a term between one and six months;
- The loan amount must be between \$200 and \$1,000;
- The loan must not result in negative amortization;
- The loan must be repayable in two or more payments of substantially equal amount and due in substantially equal intervals;
- The loan must have a maximum interest rate of 28%; and
- The credit union may not charge an application fee that exceeds \$20.

REQUIREMENTS

Underwriting

Ability to Repay Determination (§1041.5)

Prior to originating a covered loan, the credit union must determine that the member will have the ability to repay the loan according to its terms. Failure to do so is considered an unfair and abusive practice.

A reasonable determination of the member's ability to repay a covered loan, based either on calculation of the member's debt-to-income ratio or residual income, must:

Covered short-term loan	<ul style="list-style-type: none"> • Show that the member can make his or her payments for major financial obligations, required payments under the loan and meet basic living expenses during the shorter of: <ul style="list-style-type: none"> ○ The term of the loan; or ○ The period of time ending 45 days after consummation of the loan.
Covered longer-term balloon payment loan	<ul style="list-style-type: none"> • Show that the member can make his or her payments for major financial obligations, required payments under the loan and meet basic living expenses during the month in which the balloon payment is due and for a period of 30 days thereafter.

There is an additional requirement specific to open-end plans that provide for multiple advances. The credit union cannot permit additional advances after 90 days unless it makes a new ability to repay determination.

In determining the member's ability to repay, the credit union must collect and retain the following documentation:

- A written statement from the member identifying his or her net income and the amount of required payments for major financial obligations;
- Income verification;
- A consumer credit report; and
- A consumer report from a Registered Information System ("RIS").

Borrowing History Review (§1041.5)

In addition to making a reasonable determination about the member's ability to repay a covered loan, the credit union must also consider the member's previous borrowing history related to covered loans. After reviewing its own records as well as a consumer report obtained from an RIS, the credit union must

not extend to the member a fourth covered loan while the member has three covered loans outstanding and for a period of 30 days thereafter.

Conditional Exemption for Certain Short-Term Covered Loans (§1041.6)

Certain short-term loans that would otherwise be covered under Part 1041 are exempt from the ability to repay requirements above, if after having reviewed its own records as well as a consumer report from a RIS, the credit union determines that the loan meets all of the following requirements:

- The loan is closed-end;
- The loan does not result in negative amortization;
- The credit union does not take a security interest in a motor vehicle in connection with the loan; and
- For all currently outstanding short-term loans extended to the same member in a sequence, the principal amount:
 - For the first loan in the sequence, not greater than \$500;
 - For the second loan in the sequence, not greater than 2/3 of the principal amount of the first loan; and
 - For the third loan in the sequence, not greater than 1/3 of the principal amount of the first loan.

While these loans are exempt from the ability to repay requirements, the credit union must still conduct a review of the member's borrowing history. In addition, the ability to repay exemption does not apply if:

- The member has had an outstanding short-term covered loan in the past 30 days;
- Extension of the loan would result in the member having four or more outstanding short-term covered loans; or
- The member has had more than six short-term covered loans during any consecutive 12-month period or has had short-term covered loans outstanding for a period of more than 90 days.

Part 1041 requires that the credit union provide certain disclosures in connection with conditionally-exempted short-term covered loans extended in a sequence. Prior to consummation of the first loan in the sequence, the credit union must provide the following notice:

ABC Federal Credit Union
1-800-GO-ABCCU
www.abccu.org

Notice of restrictions on future loans

If you are unsure whether you will be able to pay \$360.00 by November 12th, 2016, you should not take out this loan.

After you repay this loan, any similar loan you take out within the next 30 days will have to be smaller. This restriction is required by federal law.

Borrowing limits:

Loan order	Maximum amount that you will be able to borrow
Loan #1 (this loan)	\$300.00
Loan #2	\$200.00
Loan #3	\$100.00
Loan #4	Not allowed

Prior to consummation of the third loan in the sequence, the credit union must provide the following notice:

ABC Federal Credit Union
1-800-GO-ABCCU
www.abccu.org

Notice of borrowing limits on this loan and future loans

Our records show that you have had two similar loans without taking a 30-day break. Under federal law, this loan must be smaller than your prior loans. And after you repay this loan, **you will not be able to take out another similar loan for at least 30 days.**

Payment Transfers

Prohibited Payment Transfer Attempts (§1041.8)

Part 1041 makes it an unfair and abusive practice for a credit union to make repeated attempts to withdraw payment from a member's account after its second consecutive attempt to do so has failed due to lack of sufficient funds, unless the credit union obtains a new and specific signed authorization to do so.

Payment Transfer Disclosures (§1041.9)

Prior to initiating the first payment withdrawal for a covered loan from a member's account, the credit union must provide a withdrawal notice. This notice need not be provided in connection with a payment transfer completed

at the member's request (e.g. automatic payment). The delivery requirements for the withdrawal notice depend on the method of delivery and are as follows:

- Delivery by mail – must be sent not later than six business days prior to the credit union initiating the payment transfer
- Electronic delivery – must be sent not later than three business days prior to the credit union initiating the payment transfer
- In-person delivery – must be provided not later than three business days prior to the credit union initiating the payment transfer.

A model form for the withdrawal notice is shown below:

ABC Federal Credit Union
1-800-GO-ABCCU
www.abccu.org

Upcoming Withdrawal Notice from ABC Federal Credit Union

On November 12, 2016, ABC Federal Credit Union will attempt to withdraw a payment of \$80 from your account ending in 0022. The payment will be withdrawn by check, using check #9999.

If this payment is not successful, we will add a \$10 returned payment fee to your balance on loan #5432.

Contact ABC Federal Credit Union at 1-800-GO-ABCCU if you have questions or need to stop this withdrawal. The institution where you have your account also may be able to assist you.

Payment breakdown

Principal now	\$0
Interest	\$80
Total payment amount	\$80

When you make this payment, your principal balance will stay the same and you will not be closer to paying off your loan.

If the member has consented to electronic delivery of disclosures, the withdrawal notice may be provided via e-mail. The credit union may utilize either of the following options for e-mail delivery of the withdrawal notice:

- Include the full notice in the body of the e-mail; or
- Provide the following electronic short notice in the body of the e-mail and provide the actual withdrawal notice as a linked URL webpage or PDF attachment.

Electronic Short Notice	
E-mail subject line:	Upcoming Withdrawal Notice from ABC Federal Credit Union
Body of the e-mail:	Upcoming Withdrawal Notice from ABC Federal Credit Union On Nov 12, 2016, we will attempt to withdraw a payment of \$80 from your account ending in 0022. View the details at abccu.org/xox302ksw .

In addition, the credit union is required to provide the member with an unusual withdrawal notice in the following situations:

- The amount of a transfer will vary from the regularly scheduled payment amount;
- The payment transfer date is not the date on which a regularly scheduled payment is due under the terms of the loan agreement;
- If the payment channel will differ from the payment channel of the transfer directly preceding it; or
- The payment transfer is for the purpose of reinitiating a returned transfer.

The delivery requirements for the unusual withdrawal notice depend on the method of delivery and are as follows:

- Delivery by mail – must be sent no earlier than 10 business days and no later than six business days prior to the credit union initiating the payment transfer
- Electronic delivery – must be sent no earlier than seven business days and no later than three business days prior to the credit union initiating the payment transfer
- In-person delivery – must be provided no earlier than seven business days and no later than three business days prior to the credit union initiating the payment transfer

A model form for the unusual withdrawal notice provided in connection with a varying payment amount is shown below:

ABC Federal Credit Union
1-800-GO-ABCCU
www.abccu.org

Alert: Unusual Withdrawal from ABC Federal Credit Union

On November 12, 2016, ABC Federal Credit Union will attempt to withdraw a payment of \$80 from your account ending in 0022. This electronic withdrawal will be made by ACH transfer.

This payment is unusual because it is larger than your originally scheduled payment. The previous withdrawal was initiated on November 2, 2016, for \$60.

If this payment is not successful, we will add a \$10 returned payment fee to your balance on loan #5432.

Contact ABC Federal Credit Union at 1-800-GO-ABCCU if you have questions or need to stop this withdrawal. The institution where you have your account also may be able to assist you.

Payment breakdown

Principal	\$50
Interest	\$20
Fees	\$10
Total payment amount	\$80

If the member has consented to electronic delivery of disclosures, the unusual withdrawal notice may be provided via e-mail. The credit union may utilize either of the following options for e-mail delivery of the withdrawal notice:

- Include the full notice in the body of the e-mail; or
- Provide the following electronic short notice in the body of the e-mail and provide the actual unusual withdrawal notice as a linked URL webpage or PDF attachment.

Electronic Short Notice	
E-mail subject line:	Alert: Unusual Withdrawal from ABC Federal Credit Union
Body of the e-mail:	Alert: Unusual Withdrawal from ABC Federal Credit Union On Nov 12, 2016, we will attempt to withdraw a payment of \$80 from your account ending in 0022. This payment is unusual because it is larger than your originally scheduled payment. View the details at abccu.org/xox302ksw .

If the credit union has initiated two consecutive failed payment transfer attempts from the member's account, it must provide the member with a consumer rights notice. The notice must be provided no later than three business

days after the second consecutive payment attempt has failed. A model form for the consumer rights notice is shown below:

ABC Federal Credit Union
1-800-GO-ABCCU
www.abccu.org

Notice: ABC Federal Credit Union is no longer permitted to withdraw loan payments from your account
Our last two attempts to withdraw payment on your loan #5432 from your account ending in 0022 were returned because your account did not contain enough funds to cover the payment. To protect your account, federal law prohibits us from trying to withdraw payment again without your permission.

We may contact you to talk about your payment choices going forward.

Previous payment attempts

Payment due date	Date of attempt	Amount	Fees charged by ABC Federal Credit Union
November 7, 2016	November 7, 2016	\$80	\$10 returned payment fee
November 7, 2016	November 10, 2016	\$80	\$10 returned payment fee

The Consumer Financial Protection Bureau (CFPB) created this notice to inform you of your rights under federal law. The CFPB is a federal government agency built to protect consumers. To learn more about your rights as a borrower, visit www.cfpb.gov/payday.

If the member has consented to electronic delivery of disclosures, the consumer rights notice may be provided via e-mail. The credit union may utilize either of the following options for e-mail delivery of the consumer rights notice:

- Include the full notice in the body of the e-mail; or
- Provide the following electronic short notice in the body of the e-mail and provide the actual consumer rights notice as a linked URL webpage or PDF attachment.

Electronic Short Notice	
E-mail subject line:	Notice: ABC Federal Credit Union is no longer permitted to withdraw loan payments from your account
Body of the e-mail:	<p>Notice: ABC Federal Credit Union is no longer permitted to withdraw loan payments from your account</p> <p>Our last two attempts to withdraw payment from your account ending in 0022 were returned. To protect your account, federal law prohibits us from trying to withdraw payment again without your permission.</p> <p>View the details at abccu.org/xox302ksw.</p>

Information Furnishing Requirements (§1041.10)

For each covered loan the credit union makes, it must furnish certain types of information that vary based on the status of the loan and at different times as prescribed by Part 1041. Information must be submitted to each Registered Information System ("RIS") that, as of the date of loan consummation:

- Has been registered with the CFPB for 180 days or more;
- Has been provisionally registered with the CFPB for 180 days or more; or
- Has subsequently become registered with the CFPB.

The CFPB will publish on its website and in the Federal Register notice of registration of an RIS as well as notice of suspension or revocation of an RIS' registration. An RIS' registration is effective as of the date the CFPB publishes its notice of registration. An RIS' registration is considered suspended or revoked as of the date the CFPB publishes its notice of suspension or revocation.

The chart below identifies the types of information that must be submitted in connection with each covered loan and the applicable timing requirements:

Loan Status	Information to be Furnished	Timing
At loan consummation	<ul style="list-style-type: none"> • Information necessary to identify the loan • Information necessary to allow the RIS to identify the consumer responsible for the loan • Whether the loan is a covered short-term loan or a covered longer-term balloon payment loan • Whether the loan was originated under §1041.5 or §1041.6 (as applicable) • The principal amount borrowed (for loans originated under §1041.6) <hr/> <p>For loans that are closed-end:</p> <ul style="list-style-type: none"> • The fact that the loan is closed-end • The date each payment is due • The amount due on each payment <hr/> <p>For loans that are open-end:</p> <ul style="list-style-type: none"> • The fact that the loan is open-end 	Credit union must furnish the information no later than the date of loan consummation or as close in time as feasible to that date

Loan Status	Information to be Furnished	Timing
	<ul style="list-style-type: none"> • The credit limit on the loan • The date each payment is due • The minimum amount due on each payment date 	
While the loan is outstanding	<ul style="list-style-type: none"> • Any updates to the information furnished at consummation 	Credit union must furnish any update to information previously furnished within a reasonable period of time following the event that causes the previously furnished information to be out of date
When the loan ceases to be outstanding	<ul style="list-style-type: none"> • The date the loan ceased to be outstanding • Whether all amounts owed in connection with the loan were paid in full, including: <ul style="list-style-type: none"> ○ The amount financed ○ Charges included in the cost of credit • Charges excluded from the cost of credit with the loan were paid in full, including: <ul style="list-style-type: none"> ○ The amount financed ○ Charges included in the cost of credit ○ Charges excluded from the cost of credit 	Credit union must furnish this information no later than the date the loan ceases to be an outstanding loan, or as close in time as feasible to that date

Compliance Program and Record Retention (§1041.12)

Compliance Program

A credit union originating covered loans must develop and follow written policies and procedures that are reasonably designed to ensure compliance with the requirements of Part 1041. These policies and procedures must be appropriate to the size and complexity of the credit union and the nature and scope of its covered lending activities.

Record Retention

Credit unions must retain evidence of compliance with Part 1041 for 36 months after the date on which a covered loan ceases to be outstanding. The documentation that must be retained in connection with each covered loan includes:

- The loan agreement;
- The consumer report obtained from an RIS;
- The written statement obtained from the member identifying his or her net income and the amount of required payments for major financial obligations;
- Verification evidence for the member's net income and payments for major financial obligations;
- Evidence of any leveraged payment mechanism obtained by the credit union from the member;
- Authorization for any additional payment transfers; and
- The underlying one-time electronic transfer authorization or underlying signature check.

In addition, credit unions must retain the following records electronically in tabular format:

Information regarding origination calculations and determinations made for a covered loan during any relevant monthly period	Information regarding the type, terms and performance of covered loans	Information regarding payment practices
<ul style="list-style-type: none"> • Projection of the member's net income • Projection of the amounts of the member's major financial obligations • Calculated residual income or debt-to-income ratio • Estimated basic living expenses • Other member-specific information considered in making the ability to repay determination 	<ul style="list-style-type: none"> • The information required to be furnished under 1041.10(c) – see chart above • Whether the credit union obtained a security interest in the member's vehicle • If a security interest in the member's vehicle was obtained, whether repossession initiated • The loan number (1, 2 or 3) in a loan sequence (if applicable) • For any payment not received or transferred by the due date, the number of days such payment was late 	<ul style="list-style-type: none"> • The amount of payment(s) due • The amount of attempted payment transfer(s) • The amount of payment(s) received or transferred • The payment channel used for attempted transfer(s) • Whether the credit union obtained additional authorization for payment transfer(s) from the member following its second consecutive attempt to do so failed due to lack of sufficient funds

Information regarding origination calculations and determinations made for a covered loan during any relevant monthly period	Information regarding the type, terms and performance of covered loans	Information regarding payment practices
	<ul style="list-style-type: none"> • The date the last or final payment was received • The date the loan ceased to be an outstanding loan and whether all amounts owed in connection with the loan were paid in full 	

Other

Prohibition Against Evasion (§1041.13)

A credit union may not take any action with the intent of evading the requirements of Part 1041.

Conflict of Laws

If a state or local jurisdiction adopts further regulatory measures that are more protective of the consumer than those prescribed by Part 1041, the state or local regulatory measures shall apply.

EFFECTIVE DATE(S)

Section 1024.11 related to Registered Information Systems is effective 60 days following publication in the Federal Register. The remainder of Part 1041 is effective 21 months following publication in the Federal Register.

CUNA CONTACTS

- For additional information related to CUNA's advocacy efforts, please contact Leah Dempsey, CUNA's Senior Director of Advocacy and Counsel at LDempsey@cuna.coop
- For additional information related to compliance with the rule, please contact CUNA Compliance at cucomply@cuna.coop

QUICKLINKS

- [Final Rule](#)
- [CFPB Fact Sheet](#)